Administrative Conference
of the United States

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# NEGOTIATED
# RULEMAKING
# SOURCEBOOK

Office of
the Chairman
1995

Administrative Conference of the United States

The Administrative Conference of the United States was established by statute as an independent agency of the federal government in 1964. Its purpose is to promote improvements in the efficiency, adequacy and fairness of procedures by which federal agencies conduct regulatory programs, administer grants and benefits, and perform related governmental functions.

To this end, the Conference conducts research and issues reports concerning various aspects of the administrative process and, when warranted, makes recommendations to the President, Congress, particular departments and agencies, and the judiciary concerning the need for procedural reforms. Implementation of Conference recommendations may be accomplished through direct action on the part of the affected agencies or legislative changes.

# NEGOTIATED RULEMAKING SOURCEBOOK

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**OFFICE OF THE CHAIRMAN**
**ADMINISTRATIVE CONFERENCE OF THE UNITED STATES**

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# TABLE OF CONTENTS

**Foreword** ........................................................ xiii

**Introduction** ........................................................ xv

**Acknowledgments** ........................................................ xvii

**1. What is Negotiated Rulemaking?** ................................ 1

Why Use Negotiated Rulemaking; Benefits of Negotiated Rulemaking; Some Drawbacks; Criteria for Negotiated Rulemaking; Procedures; Federal Agency Experience

**Appendix:**

Procedures for Negotiating Proposed Regulations, Administrative Conference Recommendation 82-4 ................................ 11

Procedures for Negotiating Proposed Regulations, Administrative Conference Recommendation 85-5 ................................ 15

EPA Flow Chart for Negotiated Rulemaking ............ 18

Lee M. Thomas, *The Successful Use of Regulatory Negotiation by EPA*, 13 Admin. L. News 1 (Fall 1987) ........................ 20

Assessment of EPA's Negotiated Rulemaking Activities ........................................................ 23

**2. When to Use Negotiated Rulemaking** ......................... 37

Evaluating a Rule's Suitability for Negotiated Rulemaking; How Is Negotiated Rulemaking Proposed?

Appendix:

Selection Criteria (EPA) ........................................ 42

Notice of EPA Regulatory Negotiation Project .......... 43

Letter from John McGlennon ................................ 45

Discussion on the Use of Consultation and Consensus-Building Processes ........................ 48

**3. Statutory Basis for Negotiated Rulemaking** .................. 67

Administrative Procedure Act; Federal Advisory Committee Act; Other Requirements

Appendix:

Negotiated Rulemaking Act of 1990 ....................... 76

Federal Administrative Procedure Sourcebook, Chapter 14, Negotiated Rulemaking Act ........... 84

Statement of Senator Carl Levin (August 10, 1988) ................................................ 91

Administrative Procedure Act §553 ....................... 97

Ex Parte Communications in Informal Rulemaking, Administrative Conference Recommendation 77-3 ................................ 98

Federal Advisory Committee Act ........................ 100

Federal Advisory Committee Management Final Rule (GSA) .............................................. 107

**4. The Convening Process** .......................................... 123

Selecting a Convenor; Steps in the Convening Process; Decision to Proceed; Final Convening Phase; Federal Advisory Committee Act

**Appendix:**

Cover Letter for FACA Charter (EPA) .................. 132

Wood-Burning Stoves FACA Charter (EPA) ........... 134

Oil Spill Vessel Response Plans FACA Charter (Coast Guard) ............................................ 136

EPA Memorandum on Wood-Burning Stoves .......... 138

Notice of Intent to Form Advisory Committee on Wood-Burning Stoves (EPA) .................... 141

Notice of Establishment and Meeting of Wood-Burning Stoves Advisory Committee (EPA) ...................................................... 146

Notice of Intent to Form Advisory Committee on Roadway Worker Protection (Federal Railroad Administration) ................. 147

Notice of Establishment and Meeting of Advisory Committee on Roadway Worker Protection (FRA) ........................... 154

Notice of Meeting Schedule of Advisory Committee on Nondiscrimination in Air Travel (DOT) ...................................... 159

Notice of Intent to Form Advisory Committee on Safety Standards for Steel Erection (OSHA) ................................ 160

Notice of Establishment of Steel Erection Advisory Committee (OSHA) ....................... 171

Notice of Meeting and Appointment of Members of Steel Erection Advisory Committee (OSHA) .............................. 173

Letter to OSHA on Negotiation for Benzene .......... 183

Order of U.S. District Court, *California v. Hodel* ............................................... 188

**5. Orientation and Training of Participants** .................. 193

Objectives; Content of Training Sessions

**Appendix:**

Agenda for Training Session (DOT) ..................... 196

Agenda for Training Session (EPA) ..................... 199

Agenda for Training Session (FCC) ..................... 205

**6. Negotiating the Rule** ............................................ 207

Design of the Negotiations; Organizational Meeting; Consensus; Structuring the Negotiating Sessions; Meeting Management; Deadlines; Coordination, Agency Review and Concurrence

**Appendix:**

Notice of Meeting of Steel Erection Advisory Committee (OSHA) ...................... 217

Notices of Meetings on Wood-Burning Stoves (EPA) .............................................. 218

Organizational Protocols for Wood-Burning Stoves (EPA) .............................................. 219

Organizational Protocols for Oil Spill Vessel Response Plans (Coast Guard) ............. 222

**7. Concluding the Negotiations** .................................... 229

Final Steps; Evaluation of the Rulemaking Effort

**Appendix:**

Notice of Results of Negotiation for Wood-Burning Stoves (EPA) ................................ 234

Agreement on Wood-Burning Stoves (EPA) ............ 240

Notice of Proposed Rulemaking (Preamble) on Wood-Burning Stoves (EPA) .................... 242

Notice of Proposed Rulemaking (Preamble) on Flight Time Limitations (FAA) ................. 250

Notice of Meeting (After Comment Period) (FAA) .................................................. 255

Mediator's Summary Letter on Benzene Negotiations (OSHA) .................................. 256

Cover Letter for Report on RCRA Permit Modification (EPA) .................................... 259

Committee Statement on RCRA Permit Modification (EPA) .................................... 261

**8. Resources and Logistics** ........................................ 267

Convenor and Mediator Services; Committee-Sponsored Research; Expenses for Training, Orientation and Meetings; Expenses of Participation; Reimbursement for Time

**Appendix:**

Table of Costs of EPA Negotiations ..................... 274

Acquiring the Services of "Neutrals," Administrative Conference Recommendation 86-8 .................................. 275

George D. Ruttinger, *Acquiring the Services of Neutrals for Alternative Means of Dispute Resolution and Negotiated Rulemaking* (Report to the Administrative Conference), 1986 ACUS 863 ............. 279

Commerce Business Daily Procurement Notice (EPA) ................................................ 324

Commerce Business Daily Procurement Notice (Interior) ................................................ 324

EPA Contract for Support Services ..................... 325

Interior Contract for Support Services .................. 353

**9. Negotiated Rulemaking at State Level** ...................... 369

Negotiated Rulemaking; Policy Dialogues and Other Consensus-Building Efforts

**10. Agency Experience with Negotiated Rulemaking** ......... 375

Department of Agriculture ................................ 375

Department of Education .................................. 376

Department of Energy ...................................... 379

Department of Health & Human Services .............. 379

Department of Housing & Urban Development ........ 380

Department of the Interior .................................. 380

Department of Labor ........................................ 382

Department of Transportation ............................ 383

Environmental Protection Agency ........................ 387

Farm Credit Administration ................................ 395

Federal Communications Commission .................. 395

Federal Trade Commission ................................. 396

Interstate Commerce Commission ........................ 397

Nuclear Regulatory Commission .......................... 397

**11. Sources of Assistance** ............................................ 399

Organizations with Experience in Negotiated Rulemaking or Mediation of Public Policy Disputes

**12. Bibliography** ........................................................ 411

**13. Selected Articles** ................................................ 427

Index to Articles ............................................ 427

**Comprehensive Analyses**

Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 Geo. L. J. 1 (1982) ................................................ 431

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Philip J. Harter, *The Role of the Courts in Reg-Neg -- A Response to Judge Wald*, 11 Colum. J. Envtl. L. 51 (1986) .................... 767

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Lawrence Susskind & Laura Van Dam, *Squaring Off at the Table, Not in the Courts*, Tech. Rev., p. 37 (July 1986) ....................... 862

William H. Miller, *Bypassing the Lawyers*, Industry Week, June 23, 1986, p. 20 .............. 869

Mike McClintock, *Regulating Wood Stove Emissions*, Wash. Post, Sept. 25, 1986, (Wash. Home) p. 5 ..................................... 870

*EPA Negotiates Proposed Rule on Asbestos in Schools*, 1 BNA ADR Report 133 (July 9, 1987) ............................................ 872

*Participants and Facilitators Discuss Negotiation of EPA's Proposed Rule on Asbestos in Schools*, 1 BNA ADR Report 154 (July 23, 1987) ........................... 875

Rena Steinzor & Scott Strauss, *Building a Consensus: Agencies Stressing "Reg-Neg" Approach*, Legal Times, Aug. 3, 1987, p. 16 .................................... 880

Marshall J. Breger, Letter Replying to Steinzor & Strauss, Legal Times, Aug. 10, 1987 ........................................... 886

Marianne Lavelle, *"Reg-Neg" Revving Up in D.C.*, Nat'l L. J., March 21, 1988, p. 1 ........................................................ 887

*Despite Impasse, Parties Praise DOT's Non-discrimination Reg-Neg*, 2 BNA ADR Report 117 (March 31, 1988) ................ 890

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Ellen Siegler, *Regulatory Negotiations: A Practical Perspective*, 22 Envtl. L. Rep. (no. 10) 10647 (1992) .................................. 917

# CHAIRMAN'S FOREWORD

The Administrative Conference published the *Negotiated Rulemaking Sourcebook* in 1990 as a handbook and reference manual intended primarily for use by federal agencies interested in improving their rulemaking procedures. Since that time, interest in negotiated rulemaking (or "reg-neg") has grown substantially. With bipartisan support Congress subsequently passed the Negotiated Rulemaking Act of 1990, which was signed into law by President Bush. The Clinton Administration and the National Performance Review have also been strong supporters of this innovative procedure, which is designed to increase and improve public participation in federal agency programs. Meanwhile, Congress on several occasions has required specific use of reg-neg. Thus the need for education, advice and assistance in the effective and appropriate use of the process continues to grow. With the encouragement and financial support of the Environmental Protection Agency, the Administrative Conference has now prepared an updated version of the *Sourcebook*.

In passing the Negotiated Rulemaking Act, Congress noted that the ordinary rulemaking procedures used by agencies tend to discourage the affected parties from meeting and communicating with each other. Furthermore, the traditional processes often cause parties with different interests to assume conflicting and antagonistic positions and to engage in protracted and expensive litigation. It is precisely to respond to this situation that the Administrative Conference pioneered the application of negotiations and mediation to agency rulemaking.

In a 1982 recommendation, the Conference suggested that by bringing interested parties together in a cooperative setting at the front end of the rulemaking process, much of the litigation that occurs at the conclusion of a rulemaking would be obviated. The concept of negotiated rulemaking gives the people who have real interests at stake in a particular rule the opportunity to work toward finding solutions to shared problems. Reg-neg has the capacity to reduce the likelihood of litigation, to produce faster and less costly rulemaking -- and to create objectively better rules. Moreover, such rules are likely to be more acceptable to the parties involved.

The Conference originally worked closely with officials of those agencies that were willing to be pioneers in this field. As interest in reg-neg has grown in both the legislative and executive branches, we have expended our program to include written materials, training, and technical assistance. Through ongoing contacts with agencies, convenors, academics, and private participants, we have acted as an information clearinghouse about how both the public and the agencies can benefit from using negotiations in rulemaking. The *Negotiated Rulemaking Sourcebook* is a compilation of this experience in a convenient package and is a key element of our assistance.

To our knowledge, the *Sourcebook* is the only volume available devoted to the conduct of negotiated rulemaking. I hope that publication of the revised version will continue to stimulate increased interest and activity in the search for cooperative solutions to regulatory problems. Our ultimate goal, of course, is greater efficiency and fairness in the rulemaking process, and we believe that the expanded use of negotiated rulemaking by federal agencies constitutes a major step in that direction.

Thomasina V. Rogers
Chairman

# INTRODUCTION

The 1995 revision of the *Negotiated Rulemaking Sourcebook* has been prepared as a guide and reference manual for federal agencies and others interested in use of negotiated rulemaking. The *Sourcebook* is based on the best available research and the collected experience of the government agencies and other parties that were willing to try this innovative technique for resolving disputes arising in rulemaking.

After introductory chapters that explain the procedure, when to use it, and the statutory basis for negotiated rulemaking, the book addresses sequentially the steps involved in convening, training participants, conducting negotiations, and concluding a "reg-neg" proceeding. The Negotiated Rulemaking Act of 1990 is reprinted in the appendix to chapter 3, and its provisions are discussed throughout the first eight chapters. Relevant state experience is summarized in chapter 9. A compendium of negotiated rulemaking experience of federal agencies through May 1995 appears in chapter 10, including citations to many of the significant notices published. A partial list of sources of assistance follows in chapter 11. Chapter 12 contains an extensive bibliography. Finally, we have included a collection of articles that may help illuminate the issues and the experience to date. An index to the articles appears at the beginning of chapter 13.

Most chapters in the *Sourcebook* consist of a text that discusses the subject of the chapter, followed by an appendix. These appendices contain relevant statutes, Federal Register notices, Administrative Conference recommendations, brief articles, and other illustrative material. In general, a reference in a particular chapter to a document appearing "in the appendix" (without referring to a chapter number) means that that document is reprinted in the appendix to the same chapter.

The primary audience for the *Sourcebook* is intended to be agency officials -- those who are considering use of negotiated rulemaking and need to know more about it, and those who have decided to use the process and need a practical guide. To serve these needs, we have included a large number of sample documents of the kinds that will have to be drafted at various stages of conducting a reg-neg. While we have tried to include a variety of such material from different agencies and different proceedings, we have also chosen to retain from the 1990 *Sourcebook* virtually the entire collection of public notices from a single negotiated rulemaking -- EPA's woodburning stove proceeding -- so that the user of the *Sourcebook* can follow its development. Although the woodburning stove reg-neg preceded the Reg-Neg Act (and therefore contains no references to it), the notices do illustrate all of the steps required. Other more recent examples are also included for reference.

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The Administrative Conference is grateful to the Environmental Protection Agency for its generous financial support that has made possible the publication of a revised and updated printing of the *Sourcebook*. The Conference also wishes to thank EPA for making available the services of co-author Deborah S. Dalton, and to express appreciation to Thomas E. Kelly, Director, Office of Regulatory Management and Evaluation, for his support of this project.

Many individuals contributed to the *Negotiated Rulemaking Sourcebook* in a variety of ways. On the Administrative Conference staff, special thanks are due to Deborah Laufer and Katie Zeigler for bibliographic and general research assistance. Oskian Kouzouian helped with the details of publication of the volume. Diane Liff, Kimberly D'Souza, Sharon Anderson and Gloria Coffey each helped out at a moment of special need. Valuable comments on the revised draft and organization of the *Sourcebook* were received from Charles Pou, Jr.

We acknowledge also the cooperation of the numerous private publishers who granted permission to reprint copyrighted material in the *Sourcebook*.

David M. Pritzker
Project Director

# CHAPTER 1 - WHAT IS NEGOTIATED RULEMAKING?

Negotiated rulemaking (sometimes known as "regulatory negotiation" or "reg-neg") emerged in the 1980's as an alternative to traditional procedures for drafting proposed regulations. With the passage of the Negotiated Rulemaking Act of 1990, the recommendations of the National Performance Review in 1993, and various directives by President Clinton, negotiated rulemaking enjoys increasing and widespread bipartisan support as a means of achieving better regulation through the cooperative efforts of government agencies and the private sector.

The essence of the idea is that in certain situations it is possible to bring together representatives of the agency and the various interest groups to negotiate the text of a proposed rule. The negotiators try to reach a consensus through a process of evaluating their own priorities and making tradeoffs to achieve an acceptable outcome on the issues of greatest importance to them. If they do achieve a consensus, then the resulting rule is likely to be easier to implement and the likelihood of subsequent litigation is diminished.

The Administrative Procedure Act does not require public participation in the drafting stage of agency rulemaking. It requires only that the agency publish any proposed rule and allow an opportunity for comment. (See chapter 3 for a discussion of the Administrative Procedure Act and negotiated rulemaking.) Under the ordinary rulemaking procedure, an agency may or may not have contacts with persons whose activities are regulated -- or with the general public -- for the purpose of acquiring information that may be helpful. However, any such contacts are usually informal and unstructured. They may be initiated by the agency or by the public. Typically, there is no opportunity for interchange of views among the parties, even where an agency chooses to conduct a hearing. Reg-neg offers such an opportunity through procedures designed to achieve consensus.

In 1982, the Administrative Conference of the United States set forth criteria for identifying rulemaking situations for which reg-neg is likely to be successful (Recommendation 82-4, 1 CFR §305.82-

4). These criteria were intended to guide agencies in making the key determination whether reg-neg is appropriate for particular regulatory problems. The Conference also suggested specific procedures to be followed by agencies in applying this approach. Additional refinements, based on a study of initial agency experiences with reg-neg, were recommended in 1985 (Recommendation 85-5, 1 CFR §305.85-5). The Conference recommendations, of course, are not mandatory procedures, but may best be used by agencies as a starting point for applying the concept of negotiated rulemaking to their own situations. Both recommendations are reprinted in the appendix.

The Negotiated Rulemaking Act of 1990 (Public Law No. 101-648, codified at 5 U.S.C. §§561-570) establishes basic statutory requirements for the use of reg-neg, but allows great flexibility for implementation by federal agencies. The Act emphasizes effective communication with the affected public, adequate opportunity for public participation, and openness of the entire process. The Act encourages "innovation and experimentation with the negotiated rulemaking process or with other innovative rulemaking procedures otherwise authorized by law." (5 U.S.C. §561) The statute is reprinted in the appendix to chapter 3.

Negotiated rulemaking should be viewed as a supplement to the rulemaking provisions of the Administrative Procedure Act. This means that the negotiation sessions generally take place prior to issuance of the notice and the opportunity for the public to comment on a proposed rule that are required by the Act (5 U.S.C. §553). In some instances, negotiations may be appropriate at a later stage of the proceeding.

## Why Use Negotiated Rulemaking?

The adversarial nature of the normal rulemaking process is often criticized as a major contributor to the expense and delay associated with regulatory proceedings. Agency rulemaking may be perceived as merely the first round in a battle that will culminate in a court decision. The need to establish a formal record as a basis for potential litigation sharpens the divisions between parties, and may foreclose any willingness to recognize the legitimate viewpoints of others.

In these circumstances, parties often take extreme positions in their written and oral statements. They may choose to withhold information that they view as damaging. A party may appear to put equal weight on every argument, giving the agency little clue as to the relative importance it places on the various issues. What is lacking is an opportunity for the parties to exchange views and to focus on finding constructive, creative solutions to problems.

The negotiated rulemaking process uses negotiation and consensus, not to avoid conflict, but to channel the resources and efforts of the parties toward solving the problems presented. In short, the process fosters creative activity by a broad spectrum of interested persons, focused on producing better, more acceptable rules.

## Benefits of Negotiated Rulemaking

When an agency considers using negotiated rulemaking to solve a regulatory problem, it must weigh the advantages and disadvantages of using the process. While some of the considerations derive from the specific circumstances of a rule and cannot be discussed here, others are more general.

The long-term benefits of negotiated rulemaking include:

- reduced time, money and effort expended on developing and enforcing rules,
- earlier implementation,
- higher compliance rates, and
- more cooperative relationships between the agency and other parties.

These benefits flow from the broader participation of the parties, the opportunity for creative solutions to regulatory problems, and the potential for avoiding litigation.

In programs with a history of adversarial rulemaking, it is not unusual for parties to negotiate a settlement under the supervision of a court after the rule has been published. Particularly in such programs, negotiation of a rule *prior to the agency's publication of a proposed rule* can save the agency and other parties both time and resources.

By avoiding litigation, regulated businesses (or others who need to plan for the future) can ordinarily know at an earlier time how the rule will affect them. This knowledge enables them to plan capital expenditures or production changes earlier than if they faced years of litigation and uncertainty about the outcome. Similarly, the public would receive on a more timely schedule those benefits that Congress intended to flow from the promulgation of the rule. (See, for example, "*Regulating Wood-Stove Emissions*," Washington Post, September 25, 1986, reprinted in chapter 13.)

Reducing the risk of costly litigation, however, is only one of the benefits of negotiated rulemaking. Even in programs with no history of adversarial rulemaking, negotiations can provide the agency with a better understanding of the concerns of potentially affected parties, of the relative importance to them of different regulatory choices, and of the factual basis for the regulation. This is true whether or not consensus is attained. Regulatory negotiations can have the effect of enfranchising parties who have important interests at stake, but who may be relatively quiet or may feel relatively powerless under normal rulemaking procedures. Rules drafted by persons who must ultimately be governed by them are more likely to be practical, and therefore more acceptable to affected persons.

Agencies typically receive a lot of both solicited and unsolicited input from affected parties during the pre-proposal stage of rulemaking. Frequently, data and opinions are received from affected parties sequentially: party A submits data on its industry's products or services; then party B, in a separate submission, describes the problems with the products or services provided to the public by the industry. Parties A and B do not communicate directly with each other, and are usually more interested in building a record that states their best positions rather than reaching some practical accommodation on the issues. The agency staff is presented only with polar views from the regulated community and the interested public. Staff must then fashion a regulation that is statutorily sound, practical, and capable of implementation, but without much "reality testing." This means that the rule is not subjected to any procedure whereby agency staff can learn the practical consequences of one or more alternatives under consideration, through observing reactions and interactions among potentially affected parties. In a negotiated rulemaking proceeding, representatives of all of the affected interests come together and can hear and discuss one another's positions and concerns. The give-and-take of the negotiation process can provide all participants, including the agency, with a realistic opportunity to have their assumptions and data questioned and tested by parties with other viewpoints. The result will be a more effective rule.

Under normal rulemaking procedures, an agency is frequently the only party generating solutions to rulemaking dilemmas. Affected outside parties state their most favorable positions and criticize agency proposals without proposing practical solutions. The dynamic nature of negotiating forces each party to participate in crafting solutions to issues that are on the table for resolution. A party is usually not able merely to criticize a proposal under consideration. Other parties will press for finding an alternative proposal that might satisfy the dissenting party. The range of parties at the table in a well-structured regulatory negotiation provides the raw materials, the incentives, and the opportunity for greater creativity in crafting solutions than would be present if the rule were drafted by agency staff alone.

Experience shows that parties in a reg-neg, faced with the reality that the agency will write its own rule if they cannot do it themselves, will have a strong incentive to achieve in a draft rule those points that are most important to them, while compromising on matters that are of less importance. Where consensus is achieved, participants in the negotiations often tend to acquire an interest in seeing the process succeed. They may feel that they have a stake in the resulting regulation. EPA has called this "ownership" of the negotiated rule.

The benefits noted are discussed more fully in "*An Assessment of EPA's Negotiated Rulemaking Activities*," which is reprinted in the appendix.

## Some Drawbacks

Negotiated rulemaking can be resource-intensive in the short term for both the agency and the other affected interests. While there are likely to be significant long-term savings in total resources required, the concentration in the short term may cause concern.

For the agency, there will be extra expenditures just to conduct the reg-neg process including costs of the convenor and mediator. In addition, the compression of the rulemaking schedule may require the agency to allocate staff and technical contractor resources for use over a shorter period of time than in rulemakings not involving reg-neg. The agency would also have to assign a senior manager to sit at the negotiating table.

Agency internal review schedules during the negotiations are also compressed. Each related office or manager that needs to review the resolution of the issues has to respond in a timely manner so that the agency's negotiator can use the information and opinions generated in the negotiations. This can be an advantage for the conduct of the negotiations, but obviously can add to the administrative burdens of other agency personnel who are assisting the agency's representative or are otherwise involved in the rulemaking.

Some parties, such as public interest groups, may have to provide staff time and resources in excess of what they normally spend on pre-proposal contacts with the agency and on post-proposal public comments. Participation in a negotiating committee brings with it the responsibility to review additional documents and to generate ideas, proposals, and perhaps data, which can take significant time to develop. The rule must be of major importance to such a group, or it will not likely want to commit itself to participate so heavily in the proceeding.

The reader is referred to many of the papers included in chapter 13 of this *Sourcebook*, which comment further on the advantages and disadvantages of negotiated rulemaking. (An index to the articles appears at the beginning of chapter 13.)

## Criteria for Negotiated Rulemaking

The Negotiated Rulemaking Act requires a determination by the agency head that the use of the reg-neg process is in the public interest (5 U.S.C. §563). The Act gives some guidelines to assist in this determination, based on agency experience and the recommendations of the Administrative Conference. Ultimately, the decision will depend on a judgment as to whether there is a reasonable likelihood that an appropriate committee can be formed that will be able to reach consensus on a proposed rule within a fixed period of time. The decision must also take into account the availability of sufficient resources to support the process and whether the agency is willing to commit those resources.

An important consideration is whether the number of distinct interests concerned with the proposed rule, including any relevant government agencies, is small enough so that they can be fairly represented by not more than 20 to 25 negotiators. (Although the Administrative Conference initially recommended a maximum of 15, experience has shown 20 to 25 to be manageable.) The Act specifies a maximum of 25 unless the agency head determines that a larger number is necessary (5 U.S.C. §565(b)).

There should be a number of diverse issues that participants can rank according to their own priorities, so that there will be room for compromise on some of the issues as an agreement is sought. However, it is essential that the issues to be negotiated not require compromise of principles so fundamental to the parties that there will be no willingness to negotiate.

Parties must indicate a willingness to negotiate in good faith, and no single interest should be able to dominate the negotiations. The existence of a deadline for completion of negotiations, whether imposed by statute, by the agency, or by other circumstances, has been found to impart a degree of urgency that can aid the negotiators in reaching a consensus on a proposed rule.

Reg-neg is clearly not suitable for all agency rulemaking. The circumstances in which it is likely to succeed are discussed in chapter 2.

## Procedures for Negotiated Rulemaking

An agency contemplating use of negotiated rulemaking must first determine whether the problem that requires drafting of a rule is amenable to this approach. The agency would normally ask one or more "convenors" -- either outside contractors or government employees who are not otherwise involved in the proceeding -- to assess how well the circumstances meet the above criteria. The convenor would recommend to the agency whether to establish a committee to negotiate a draft rule and might also submit a proposal for the composition of the committee.

In most instances, the committee would be formally chartered under the procedures of the Federal Advisory Committee Act (FACA). While the Negotiated Rulemaking Act makes FACA applicable to reg-neg committees in general (with some modifications discussed in chapter 3), Congress has occasionally exempted certain legislatively required reg-neg committees from FACA. Also, the Unfunded Mandates Reform Act of 1995 (Public Law No. 104-4, §204) provides that FACA will not apply in certain instances involving only federal officials and elected officers of state, local, and tribal governments, or their designated employee representatives.

It is essential for the success of reg-neg that all concerned interests be represented in the negotiations. Therefore, the agency and the convenor must make reasonable efforts to ensure that all relevant interest groups and others who may be affected by the rule are aware of the proceeding. Public notices explaining the agency's plans for the proceeding, in addition to any general requirements for establishing advisory committees, can be very useful as a check against an essential party being overlooked.

Agencies have found that the actual negotiations tend to be more successful when the committee has the assistance of one or more persons with specific experience in helping others negotiate solutions to complex multi-party problems. Whether referred to as "mediators" or "facilitators," persons skilled in techniques of dispute resolution have invariably been helpful to committees attempting to negotiate rules. Persons performing this role may be the same individuals who acted as convenors, but this is not essential.

If the issues are unusually complex, or if any of the negotiators need assistance in dealing with their constituencies, then it may be advisable to have more than one mediator or facilitator. In some instances, prior knowledge of the subject matter of the negotiations may be necessary. However, in general, the most important factors in choosing "neutral" persons to assist a negotiating committee are skillfulness in dispute resolution and personal acceptability to all of the participants.

It is also important for the agency to participate fully in the negotiations, making sure that at all times the participants are aware of what action the agency is likely to take if the committee does not reach an agreement.

The goal of the committee is to reach consensus on a draft rule. The word "consensus" is usually understood in this context to mean that each interest represented concurs in the result, unless all members of the committee agree at the outset to a different meaning. If a consensus is reached by the committee, the agency ordinarily would publish the draft rule based on that consensus in a notice of proposed rulemaking -- and the agency would have committed itself in advance to doing so. Negotiations that do not result in consensus on a draft rule can still be very useful to the agency by narrowing the issues in dispute, identifying information necessary to resolve issues, ranking priorities, and finding potentially acceptable solutions.

The Administrative Conference has recommended that at the conclusion of the negotiations the committee should formally report the outcome to the agency. In practice, some agencies have found that a formal report may be unnecessary if committee records contain sufficient documentation of what took place during the negotiations. The committee records or report should identify the issues addressed, areas of agreement, and areas where there is not consensus. If the committee reaches a consensus on a draft rule, the agency should be given both the text and a concise statement of its basis and purpose. The Negotiated Rulemaking Act specifies that, where consensus is reached, the committee shall transmit to the agency a report containing the proposed rule (5 U.S.C. §566(f)). In other cases, however, the Act gives the committee the freedom to determine what information, recommendations or materials, if any, are appropriate to give to the agency.

## Federal Agency Experience

In 1983, the Federal Aviation Administration became the first Federal agency to try using negotiated rulemaking. The FAA assembled a committee to negotiate a revision of flight and rest time requirements for domestic airline pilots. The committee included representatives of airlines, pilot organizations, public interest groups, and other interested parties. The prior rules had been in effect for 30 years, a period of substantial change in the airline industry, during which the FAA had to issue more than 1000 pages of interpretations. On several occasions, the agency had proposed revisions, but withdrew them because of substantial opposition. A final rule based on the committee's negotiations was adopted in 1985, which was not challenged in court. Since then, several agencies within the Department of Transportation have used reg-neg on a variety of issues. These include the National Highway Traffic Safety Administration, the Coast Guard and the Federal Railroad Administration.

The Environmental Protection Agency has been the most consistent and committed user of negotiated rulemaking, accounting for approximately one-third of federal agency reg-negs. Rules based on a negotiated consensus include penalties for manufacturers of vehicles not meeting Clean Air Act standards, emergency exemptions from pesticide regulations, performance standards for woodburning stoves, control of volatile organic chemical equipment leaks, national emission standards for coke ovens, manifests for transporting hazardous wastes, and chemicals used in manufacturing wood furniture. In several additional proceedings, EPA based its rule on substantial agreements reached in the negotiations even though the committees were unable to agree completely on a proposal. (See the appendix for discussion and evaluation of EPA's early experience with reg-neg. A more comprehensive evaluation of EPA's reg-neg experience, conducted by the Administrative Conference, will be completed in late 1995.)

The Occupational Safety and Health Administration has used reg-neg for proposed standards on worker exposure to benzene and to a chemical known as MDA, an animal carcinogen used in the manufacture of plastics. Although the benzene effort did not result in a negotiated rule, the MDA committee reached consensus on a set of recommendations to OSHA that served as the basis for the agency's rule. OSHA established a committee in 1994 to negotiate safety standards for workers erecting steel structures. In 1992, the Office of the Solicitor of the Department of Labor issued its *Negotiated Rulemaking Handbook* as a guide for departmental use of reg-neg. In 1994, the Department produced a videotape that includes a discussion of the MDA proceeding.

Other agencies that have used negotiated rulemaking procedures include the Nuclear Regulatory Commission, Farm Credit Administration, Federal Communications Commission, Federal Trade Commission, and the Departments of Agriculture, Education, Health and Human Services, Housing and Urban Development, and the Interior. A complete list of federal negotiated rulemaking proceedings as of May 1995 appears in chapter 10.

## Appendix

The appendix to chapter 1 includes the two recommendations of the Administrative Conference on negotiated rulemaking and three documents reflecting some of the experience of the Environmental Protection Agency. The flow chart illustrates the steps in the procedure followed by EPA. An article by former Administrator Lee Thomas sets forth the reasons for EPA's active use of reg-neg. "*An Assessment of EPA's Negotiated Rulemaking Activities*" contains the findings of a study by the Program Evaluation Division of EPA.

## Recommendation 82-4, 1 CFR §305.82-4

### § 305.82-4 Procedures for Negotiating Proposed Regulations (Recommendation No. 82-4).

The complexity of government regulation has increased greatly compared to that which existed when the Administrative Procedure Act was enacted, and this complexity has been accompanied by a formalization of the rulemaking process beyond the brief, expeditious notice and comment procedures envisioned by section 553 of the APA. Procedures in addition to notice and comment may, in some instances, provide important safeguards against arbitrary or capricious decisions by agencies and help ensure that agencies develop sound factual bases for the exercise of the discretion entrusted them by Congress, but the increased formalization of the rulemaking process has also had adverse consequences. The participants, including the agency, tend to develop adversarial relationships with each other causing them to take extreme positions, to withhold information from one another, and to attack the legitimacy of opposing positions. Because of the adversarial relationships, participants often do not focus on creative solutions to problems, ranking of the issues involved in a rulemaking, or the important details involved in a rule. Extensive factual records are often developed beyond what is necessary. Long periods of delay result, and participation in rulemaking proceedings can become needlessly expensive. Moreover, many participants perceive their roles in the rulemaking proceeding more as positioning themselves for the subsequent judicial review than as contributing to a solution on the merits at the administrative level. Finally, many participants remain dissatisfied with the policy judgments made at the outcome of rulemaking proceedings.

Participants in rulemaking rarely meet as a group with each other and with the agency to communicate their respective views so that each can react directly to the concerns and positions of the others in an effort to resolve conflicts. Experience indicates that if the parties in interest were to work together to negotiate the text of a proposed rule, they might be able in some circumstances to identify the major issues, gauge their importance to the respective parties, identify the information and data necessary to resolve the issues, and develop a rule that is acceptable to the respective interests, all within the contours of the substantive statute. For example, highly technical standards are negotiated that have extensive health, safety, and economic effects; lawsuits challenging rules are regularly settled by agreement on a negotiated rule; public law litigation involves sensitive negotiation over rule-like issues; and many environmental disputes and policies have been successfully negotiated. These experiences can be drawn upon in certain rulemaking contexts to provide procedures by which affected interests and the agency might participate directly in the development of the text of a proposed rule through negotiation and mediation.

The Federal Advisory Committee Act (FACA) has, however, dampened administrative enthusiasm for attempts to build on experience with successful negotiations. Without proposing a general revision of FACA, the Administrative Conference urges that Congress amend the Act to facilitate the use of the negotiating procedures contemplated in this recommendation.

The suggested procedures provide a mechanism by which the benefits of negotiation could be achieved while providing appropriate safeguards to ensure that affected interests have the opportunity to participate, that the resulting rule is within the discretion delegated by Congress, and that it is not arbitrary or capricious. The premise of the recommendation is that provision of opportunities and incentives to resolve issues during rulemaking, through negotiations, will result in an improved process and better rules. Such rules would likely be more acceptable to affected interests because of their participation in the negotiations. The purpose of this recommendation is to establish a supplemental rulemaking procedure that can be used in appropriate circumstances to permit the direct participation of affected interests in the development of proposed rules. This procedure should be viewed as experimental, and should be reviewed after it has been used a reasonable number of times.

### RECOMMENDATION

1. Agencies should consider using regulatory negotiation, as described in this recommendation, as a means of drafting for agency consideration the text of a proposed regulation. A proposal to establish a regulatory negotiating group could be made either by the agency (for example, in an advance notice of proposed rulemaking) or by the suggestion of any interested person.

2. Congress should facilitate the regulatory negotiation process by passing legislation explicitly authorizing agencies to conduct rulemaking proceedings in the manner described in this

recommendation. This authority, to the extent that it enlarges existing agency rulemaking authority, should be viewed as an experiment in improving rulemaking procedures. Accordingly, the legislation should contain a sunset provision. The legislation should provide substantial flexibility for agencies to adapt negotiation techniques to the circumstances of individual proceedings, as contemplated in this recommendation, free of the restrictions of the Federal Advisory Committee Act and any ex parte limitations. Legislation should provide that information tendered to such groups, operating in the manner proposed, should not be considered an agency record under the Freedom of Information Act.

3. In legislation authorizing regulatory negotiation, Congress should authorize agencies to designate a "convenor" to organize the negotiations in a particular proceeding. The convenor should be an individual, government agency, or private organization, neutral with respect to the regulatory policy issues under consideration. If the agency chooses an individual who is an employee of the agency itself, that person should not be associated with either the rulemaking or enforcement staff. The convenor would be responsible for (i) advising the agency as to whether, in a given proceeding, regulatory negotiation is feasible and is likely to be conducive to the fairer and more efficient conduct of the agency's regulatory program, and (ii) determining, in consultation with the agency, who should participate in the negotiations.

4. An agency considering use of regulatory negotiation should select and consult with a convenor at the earliest practicable time about the feasibility of its use. The convenor should conduct a preliminary inquiry to determine whether a regulatory negotiating group should be empanelled to develop a proposed rule relating to the particular topic. The convenor should consider the risks that negotiation procedures would increase the likelihood of a consensus proposal that would limit output, raise prices, restrict entry, or otherwise establish or support unreasonable restraints on competition. Other factors bearing on this decision include the following:

(a) The issues to be raised in the proceeding should be mature and ripe for decision. Ideally, there should be some deadline for issuing the rule, so that a decision on a rule is inevitable within a relatively fixed time frame. The agency may also impose a deadline on the negotiations.

(b) The resolution of issues should not be such as to require participants in negotiations to compromise their fundamental tenets, since it is unlikely that agreement will be reached in such circumstances. Rather, issues involving such fundamental tenets should already have been determined, or not be crucial to the resolution of the issues involved in writing the proposed regulation.

(c) The interests significantly affected should be such that individuals can be selected who will adequately represent those interests. Since negotiations cannot generally be conducted with a large number of participants, there should be a limited number of interests that will be significantly affected by the rule and therefore represented in the negotiations. A rule of thumb might be that negotiations should ordinarily involve no more than 15 participants.

(d) There should be a number of diverse issues that the participants can rank according to their own priorities and on which they might reach agreement by attempting to optimize the return to all the participants.

(e) No single interest should be able to dominate the negotiations. The agency's representative in the negotiations will not be deemed to possess this power solely by virtue of the agency's ultimate power to promulgate the final rule.

(f) The participants in the negotiations should be willing to negotiate in good faith to draft a proposed rule.

(g) The agency should be willing to designate an appropriate staff member to participate as the agency's representative, but the representative should make clear to the other participants that he or she cannot bind the agency.

5. If the convenor determines that regulatory negotiation would be appropriate, it would recommend this

procedure to the agency. If the agency and the convenor agree that regulatory negotiation is appropriate, the convenor should be responsible for determining preliminarily the interests that will likely be substantially affected by a proposed rule, the individuals that will represent those interests in negotiations, the scope of issues to be addressed, and a schedule for completing the work. It will be important for potential participants to agree among themselves as to these matters, and their agreement can be facilitated by either the convenor or a possible participant conducting a preliminary inquiry among identified interests. Reasonable efforts should be made to secure a balanced group in which no interest has more than a third of the members and each representative is technically qualified to address the issues presented, or has access to qualified individuals.

6. The subject matter of the proposed regulation may be within the jurisdiction of an existing committee of a non-governmental standards writing organization that has procedures to ensure the fair representation of the respective interests and a process for determining whether the decision actually reflects a consensus among them. If such a committee exists and appears to enjoy the support and confidence of the affected interests, the convenor should consider recommending that negotiations be conducted under that committee's auspices instead of establishing an entirely new framework for negotiations. In such a case, the existing committee could be regarded as a regulatory negotiation group for purposes of this recommendation. (Alternatively, the product of the committee could be used as the basis of a proposed regulation pursuant to Administrative Conference Recommendation 78-4.[3])

7. To ensure that the appropriate interests have been identified and have had the opportunity to be represented in the negotiating group, the agency should publish in the FEDERAL REGISTER a notice that it is contemplating developing a rule by negotiation and indicate in the notice the issues involved and the participants and interests already identified. If an additional person or interest petitions for membership or representation in the negotiating group, the convenor, in consultation with the agency, should determine (i) whether that interest would be substantially affected by the rule, (ii) if so, whether it would be represented by an individual already in the negotiating group, and (iii) whether, in any event, the petitioner should be added to the negotiating group, or whether interests can be consolidated and still provide adequate representation.

8. The agency should designate a senior official to represent it in the negotiations and should identify that official in the FEDERAL REGISTER notice.

9. It may be that, in particular proceedings, certain affected interests will require reimbursement for direct expenses to be able to participate at a level that will foster broadly-based, successful negotiations. Unlike intervenors, the negotiating group will be performing a function normally performed within the agency, and the agency should consider reimbursing the direct expenses of such participants. The agency should also provide financial or other support for the convenor and the negotiating group. Congress should clarify the authority of agencies to provide such financial resources.

10. The convenor and the agency might consider whether selection of a mediator is likely to facilitate the negotiation process. Where participants lack relevant negotiating experience, a mediator may be of significant help in making them comfortable with the process and in resolving impasses.

11. The goal of the negotiating group should be to arrive at a consensus on a proposed rule. Consensus in this context means that each interest represented in the negotiating group concurs in the result, unless all members of the group agree at the outset on another definition. Following consensus, the negotiating group should prepare a report to the agency con-

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[3] Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulation, 1978 ACUS Recommendations and Reports 13, 1 CFR 305.78-4.

taining its proposed rule and a concise general statement of its basis and purpose. The report should also describe the factual material on which the group relied in preparing its proposed regulation, for inclusion in the agency's record of the proceeding. The participants may, of course, be unable to reach a consensus on a proposed rule, and, in that event, they should identify in the report both the areas in which they are agreed and the areas in which consensus could not be achieved. This could serve to narrow the issues in dispute, identify information necessary to resolve issues, rank priorities, and identify potentially acceptable solutions.

12. The negotiating group should be authorized to close its meeting to the public only when necessary to protect confidential data or when, in the judgment of the participants, the likelihood of achieving consensus would be significantly enhanced.

13. The agency should publish the negotiated text of the proposed rule in its notice of proposed rulemaking. If the agency does not publish the negotiated text as a proposed rule, it should explain its reasons. The agency may wish to propose amendments or modifications to the negotiated proposed rule, but it should do so in such a manner that the public at large can identify the work of the agency and of the negotiating group.

14. The negotiating group should be afforded an opportunity to review any comments that are received in response to the notice of proposed rulemaking so that the participants can determine whether their recommendations should be modified. The final responsibility for issuing the rule would remain with the agency.

[47 FR 30708, July 15, 1982]

## Recommendation 85-5, 1 CFR §305.85-5

### § 305.85-5 Procedures for Negotiating Proposed Regulations (Recommendation No. 85-5).

Negotiations among persons representing diverse interests have proven to be effective in some cases in developing proposals for agency rules. In 1982, the Administrative Conference of the United States adopted Recommendation 82-4, 1 CFR § 305.82-4, encouraging the use of negotiated rulemaking by Federal agencies in appropriate situations.[1] The concept of negotiated rulemaking arose from dissatisfaction with the rulemaking process, which since the 1960's, in many agencies, had become increasingly adversarial and formalized—unlike the brief, expeditious notice and comment procedure envisioned in section 553 of the Administrative Procedure Act. Experience has now shown that negotiated rulemaking can be a practical technique in appropriate instances.

Since Recommendation 82-4 was adopted, its recommended procedures have been followed four times by Federal agencies. The Federal Aviation Administration used negotiated rulemaking to develop a new flight and duty time regulation for pilots. The Environmental Protection Agency used negotiated rulemaking to develop proposed rules on nonconformance penalties for vehicle emissions and on emergency exemptions from pesticide regulations. The Occupational Safety and Health Administration encouraged labor, public interest, and industry representatives to negotiate a standard for occupational exposure to benzene. The benzene negotiations did not result in agreement among the parties on a proposed rule, but the other three negotiations did lead to substantial agreement resulting in two final rules (which have thus far not been challenged) and one draft rule which, after public comment, is pending before the agency.

The experience of these four cases has shown that the original recommendation was basically sound, and has provided a basis for the Administrative Conference to use in supplementing Recommendation 82-4.

It is important to view Recommendation 82-4 and the present recommendation, taken together, as a guide to issues to be considered rather than a formula to be followed. Negotiation is intrinsically a fluid process that cannot be delineated in advance. Accordingly, what will "work" in a particular case depends on the substantive issues, the perception of the agency's position by interested parties, past and current relationships among the parties, the authority of party representatives in the negotiations, the negotiating style of the representatives, the number and divergence of views within each constituency represented, and the skill of the participants and mediators. These factors are mostly dynamic and their charcter is likely to change during the negotiating process. Proponents of negotiated rulemaking must recognize the unavailability of neat formal solutions to questions of who should participate, how the negotiations should be conducted, or even the definition of "successful" negotiations.

Agencies undertaking negotiated rulemaking must be prepared to deal with these real world uncertainties by pursuing a thoughtfully flexible approach. Elements of Recommendation 82-4 and the present recommendation provide a conceptual framework within which to plan and conduct negotiations in a particular proceeding, but should not be taken as a formal model. An agency cannot merely transplant a pattern followed successfully by another agency, or even by itself on another occasion. Nevertheless, agencies that are considering negotiated rulemaking for the first time should find it helpful to discuss their plans with other agencies and persons experienced with the process.

Some agencies have indicated a concern about the effect of the Federal Advisory Committee Act on negotiated rulemaking proceedings. The four agency experiences reviewed by the Administrative Conference have not shown that the Act, as interpreted by the sponsoring agencies and participants, impeded effective negotiations. Under current judicial and agency interpretations of the Act, it appears that caucuses and other working group meetings may be held in private, where this is necessary to promote an effective exchange of views.

Another concern expressed by some agencies has been the potential costs associated with negotiated rulemaking. While aspects of the recommended process may entail some short-term additional costs, the Conference believe that potential long-range savings will more than offset the costs.

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[1] Recommendation 82-4 used the term "regulatory negotiation" to refer to this process. The present recommendation substitutes "negotiated rulemaking" to emphasize that it is addressing negotiation of rules, and not other uses of negotiations in the regulatory process.

Moreover, agencies should be aware of opportunities for assistance from within the government, for example, training provided by the Legal Education Institute of the Department of Justice, and mediation assistance by the Federal Mediation and Conciliation Service and the Community, Relations Service.

### Recommendation

1. An agency sponsoring a negotiated rulemaking proceeding should take part in the negotiations. Agency participation can occur in various ways. The range of possibilities extends from full participation as a negotiator to acting as an observer and commenting on possible agency reactions and concerns. Agency representatives participating in negotiations should be sufficiently senior in rank to be able to express agency views with credibility.

2. Negotiations are unlikely to succeed unless all participants (including the agency) are motivated throughout the process by the view that a negotiated agreement will provide a better alternative than a rule developed under traditional processes. The agency, accordingly, should be sensitive to each participant's need to have a reasonably clear expectation of the consequences of not reaching a consensus. Agencies must be mindful, from the beginning to the end of negotiations, of the impact that agency conduct and statements have on party expectations. The agency, and others involved in the negotiations, may need to communicate with other participants—perhaps with the assistance of a mediator or facilitator—to ensure that each one has realistic expectations about the outcome of agency action in the absence of a negotiated agreement. Communications of this character always should consist of an honest expression of agency actions that are realistically possible.

3. The agency should recognize that negotiations can be useful at several stages of rulemaking proceedings. For example, negotiating the terms of a final rule could be a useful procedure even after publication of a proposed rule. Usually, however, negotiations should be used to help develop a notice of proposed rulemaking, with negotiations to be resumed after comments on the notice are received, as contemplated by paragraphs 13 and 14 of Recommendation 82-4.

4. The agency should consider providing the parties with an opportunity to participate in a training session in negotiation skills just prior to the beginning of the negotiations.

5. The agency should select a person skilled in techniques of dispute resolution to assist the negotiating group in reaching an agreement. In some cases, that person may need to have prior knowledge of the subject matter of the negotiations. The person chosen may be styled "mediator" or "facilitator," and may be, but need not be, the same person as the "convenor" identified in Recommendation 82-4. There may be specific proceedings, however, where party incentives to reach voluntary agreement are so strong that a mediator or facilitator is not necessary.

6. In some circumstances, Federal agencies such as the Federal Mediation and Conciliation Service or the Community Relations Service of the Department of Justice may be appropriate sources of mediators or facilitators. These agencies should consider making available a small number of staff members with mediation experience to assist in the conduct of negotiated rulemaking proceedings.

7. The agency, the mediator or facilitator, and, where appropriate, other participants in negotiated rulemaking should be prepared to address internal disagreements within a particular constituency. In some cases, it may be helpful to retain a special mediator or facilitator to assist in mediating issues internal to a constituency. The agency should consider the potential for internal constituency disagreements in choosing representatives, in planning for successful negotiations, and in selecting persons as mediators or facilitators. The agency should also recognize the possibility that a group viewed as a single constituency at the outset of negotiations may later become so divided as to suggest modification of the membership of the negotiating group.

8. Where appropriate, the agency, the mediator or facilitator, or the negotiating group should consider ap-

pointing a neutral outside individual who could receive confidential data, evaluate it, and report to the negotiators. The parties would need to agree upon the protection to be given confidential data. A similar procedure may also be desirable in order to permit neutral technical advice to be given in connection with complex data.

9. Use of a "resource pool" may be desirable, to support travel, training, or other appropriate costs, either incurred by participants or expended on behalf of the negotiating group. The feasibility of creating such a pool from contributions by private sources and the agency should be considered in the pre-negotiation stages.

[50 FR 52895, Dec. 27, 1985]

# NEGOTIATED RULEMAKING AT EPA

## EVALUATION

- Identify issues and deadlines
- Identify interested parties
- Compare to selection criteria
- Confirm management interest
- Select convenor

## CONVENING—PHASE 1

- Identify additional parties
- Discuss RegNeg with parties
- Discuss issues with parties
- Determine willingness of parties to negotiate
- Report to agency
- Obtain agency management commitment
- Preliminary selection of 15-25 participants

## CONVENING—PHASE 2

- Obtain parties commitment to negotiate
- Publish "notice of intent to negotiate"
- Process FACA charter
- Select facilitator/mediator
- Respond to public comments on "notice"
- Adjust committee membership if necessary
- Arrange organizational meeting
- Arrange committee orientation/training

## NEGOTIATIONS

- Establish groundrules/protocols
- Define "consensus"
- Set meeting schedule
- Publish notices of meetings
- Review available information and issues
- Review draft rule or proposals if available
- Establish work groups or subcommittees as necessary
- Negotiate text or outline of proposed rule

## RULEMAKING

- Negotiations concluded
- If consensus if reached on language of rule:
  - Agency circulates draft for internal/external review
  - Agency publishes consensus as draft rule
- If consensus is reached only on issues or outline:
  - Agency drafts proposed rule
  - Agency circulates draft for internal/external review
  - Agency publishes NPRM
- If consensus is not reached:
  - Agency proceeds with rulemaking using discussions as a guide
  - Agency drafts and publishes NPRM
- Draft rule is subject to public comment
- Committee notified of public comments
- Agency revises rule if necessary
- Agency publishes final rule

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## The Successful Use of Regulatory Negotiation by EPA

**by Lee M. Thomas**

*(Editor's note: This article is an edited version of remarks made by the Administrator of the U.S. Environmental Protection Agency at a colloquium on improving dispute resolution procedures in the federal government. The colloquium was presented by the Administrative Conference of the United States on June 1, 1987, as part of its program in alternative dispute resolution. The proceedings of the entire colloquium will be published in a forthcoming issue of the* American University Journal of Administrative Law.)

The concept of negotiation and consultation is becoming a part of the institutional fabric of the U.S. Environmental Protection Agency. As the Administrator for the last 2½ years and Assistant Administrator for two years before that, it is easy for me to understand why this has happened. EPA frequently finds itself involved in disputes, and I would recommend the Administrator's job to only those who like dispute resolution.

The issues EPA confronts are complex. Resolving those issues requires input from many different parties. We have a broad range of responsibilities. Our statutory authority is incorporated in a dozen laws. Our responsibilities may, at any particular time, range from pesticide decisions to decisions relating to whether or not to fill a wetland area or what kind of standard to set for air pollution control. So the work we do is technically complex.

It is also legally complex. Fortunately, I am not a lawyer, and that has helped me sort through the issues. The laws oftentimes lack extensive legislative history to guide us. Many of the laws that we administer are relatively new, enacted within the last five to ten years. But each has certainly been tested actively since enactment.

And, the issues we deal with are definitely emotionally complex. Many people have strong opinions on our standards and how we implement our statutes. In many cases that emotion revolves around the issue of residual risk, because that in fact is what we often end up dealing with. The debate is not on the level of protection. Rather, it is frequently on what level of risk remains once our particular standard or our particular action is completed. Additional debate may focus on the economic impact of the action we may be promoting.

The players in these debates are many. They include our agency; other federal agencies that have direct involvement and interest in how we resolve issues; the regulated community, and for us that is virtually all business and industry, and many levels of government; public interest groups, particularly those that have been formed to advocate more environmental controls; our counterpart state and local regulators—all states have counterpart agencies to ours and in many cases so do local governments; and, finally, citizens at large or citizens who have a particular interest in a site-specific action we are taking.

Now, with that range of players and that range of complexity, and with the fact that our issues are not becoming less difficult but, I believe, more difficult to resolve, we have established negotiation, consultation, and improved communication as an overall management theme within our agency. Particularly over the last several years we have worked hard to see how that theme could be incorporated into the actions that our agency takes.

Specifically we have incorporated negotiation and consultation into our regulatory development process, but beyond that we have also moved to try to establish this approach as a part of our policy development and as a part of our site-specific action program in the agency—whether it is cleaning up a Superfund site or going forward to permit a hazardous waste disposal facility. Finally, we are moving forward to establish this concept as a major part of our enforcement efforts.

Regarding regulatory negotiation, several years ago we looked at the processes EPA used for developing regulations and decided to explore the utility of supplementary and complementary approaches.

*(continued on page 3)*

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### Regulatory Negotiation

*(continued from page 1)*

We did this for several reasons:

First, our major regulations were taking a very long time to complete, three to five years on average. I am signing a regulation in the next couple of days in the air program that took ten years to develop. Regulations may take that long for a variety of reasons, and we were interested in seeing whether we could shorten that time frame.

Second, as I indicated, our regulations are quite complex technically and otherwise, and we were interested in seeing how we could bring to the table as much technical information as possible while the regulations were being developed.

Third, we were interested in seeing if there were alternatives to the traditional rulemaking process of going out with a proposal, soliciting comments, analyzing the comments, and then going final. Was there another way to solicit technical input as the regulation was being developed?

Finally, we wanted to reduce the amount of manpower and time we were spending on litigating our regulations. We found that over three-quarters of our regulations once promulgated were litigated, a process that we felt was exacting quite a toll on our own agency resources.

EPA's regulatory negotiation process began with a pilot effort back in 1983. It is an effort that now has resulted in seven major rulemakings going through the negotiation process. Three of them actually are out as final regulations. It started off with a regulation for nonconformance penalties for major truck makers, and went through emergency pesticide exemption regulations, farm worker protection standards, regulations for wood-burning stoves, regulations for minor permit modifications for hazardous waste facilities, a regulation for the underground injection of hazardous waste, and a regulation for the control of asbestos in schools.

Now, those regulations, as you can see, cover a range of subjects. All of them were regulations that had major interest as far as constituent groups were concerned. As a result of our experiences with these seven issues, we have evolved to the point in the agency that clearly the concept of negotiation in rulemaking has become an institutional part of our review of the course a rule should take at the beginning of the rulemaking process. We have established criteria that are used at that point to determine which rules would be appropriate for a negotiation path as opposed to the traditional path.

We have concluded within the agency—and I will give you some specifics—that regulatory negotiation does work. We term it successful in our agency, particularly when we look back at the issues I talked about: timeliness, the ability to get as much technical information as possible on the table during the development of the regulation, and the issue of litigation of the regulation once it has been completed.

Of the ones that have been completed and now are final regulations, we haven't had litigation. I think they are better regulations in that we felt there was very good technical information put on the table and debated during the negotiation process and there was a feeling of "ownership" of the regulation by the negotiators when the regulation was completed. We believe that compliance is very high because the regulated community participated actively in the negotiation process. They felt they had their day, they felt they had their technical information put on the table, and more than anything else I think they understood exactly what was meant by the regulation and what was expected of them once the regulation was final.

So I would say, as we look back upon our experiences with negotiated rules so far, they have saved time. Regulatory negotiation shortened our total process on each one of them.

It promoted what I have termed "ownership"—having a stake in the regulation—on the part of the constituent groups, environmental groups, the regulated community, citizen interest groups, EPA participants, other federal agencies, and state and local regulators, who all participated.

Regulatory negotiation has reduced litigation. At least at this point, with that limited number of regulations, we have seen a significant difference in the litigation that has resulted. We think it has provided more accountability as far as EPA is concerned in that the people developing the regulation in our agency literally sat across the table from and were very accountable to the regulated community and other interest groups, on the issues, the direction, and the resolution of those issues. In each instance we went forward with the commitment we made in the beginning, which was to use the consensus document that we proposed as a rule.

We also found that the negotiation process has had side benefits to participants. It has had traditionally adversarial groups sitting across the table from one another, learning exactly what the key issues of con-

### Regulatory Negotiation

*(continued from page 3)*

cern were from the various groups. In pesticide regulation, air quality regulation, or in other regulations that we have developed, we have seen significant improvement in the communication among groups that traditionally have had an adversarial relationship with respect to our program.

What else did we learn as a result of those negotiations? Generally there is a tight time frame. We found that one of the critical elements for success of the negotiation process is to have a deadline against which you work, whether it is a court-imposed date, a statutorily imposed date, or an agency-imposed date that is a forcing factor for negotiation. We learned that the negotiation process for rulemaking is resource-intensive for all participants, both in terms of participation on the part of the negotiators and also in terms of resources required to participate fully. Some of the public interest groups particularly have voiced concern about the ability to negotiate fully at the table without full commitment or resources behind them—not just resources to come to and participate in the sessions, but technical resources enabling them to bring to the table the full ability that an industry group, for instance, would have.

Also, we learned that regulatory negotiation requires effective screening of candidate regulations. Not all rules should go through a negotiation process. It is a limited subset of our major rules that I think would be appropriate for that process.

One of the things we have found is that commitment to developing a rule is key to having good negotiation sessions. If we have general consensus among negotiating parties that the rule will actually be developed and the negotiation is around the particular aspects of what the rule will encompass, as opposed to whether or not to have a rule, this understanding will be a major element of successful regulatory negotiation. Selection of a facilitator or maybe several facilitators, with relevant skills, is also critically important for a regulatory negotiation effort.

In most of the rules I mentioned, facilitators from outside EPA were utilized. In some cases we had a team of facilitators. In one instance the facilitator was an EPA employee outside the the program office that had primary responsibility for the rule. We think it is a key to success to ensure that the facilitator is technically skilled both in the processes of facilitation and in ability to understand the technical aspects of the rule that is being developed. If one facilitator is not strong in both, co-facilitators may well be required, and we have sometimes followed this route.

Full consensus is not necessary for success. The negotiating group should set a definition of success, with the group itself having some control over its own destiny for all important elements of the regulatory negotiation process that are identified. Clearly, up front, each one of the participants, including EPA, must understand what the ground rules are, concerning, for instance, individuals who want to leave the group during the process, whether there must be full consensus at the conclusion of the process, what commitments EPA has made to go forward with the rulemaking, and how this procedure ties in with the agency's overall administrative process. We would follow with full review of the rule once it was developed to the stage of seeking comments, and then for final agency action.

My advice to other agencies that might want to use either a negotiated rulemaking process or another kind of alternative process to resolve some issue is first to take a look at experiences that we and others have had in going forward with alternative dispute resolution. Particularly for rulemaking, look at what we have learned and what others have learned, and then take a concrete example within the agency, using the alternative dispute resolution technique.

Since the time our first negotiated rulemaking began and people saw the process actually working, we have come to be more concerned with screening requests for regulatory negotiation than with soliciting suggestions for candidate regulations. We developed real believers, I think, on the part of virtually everybody who participated.

# An Assessment of EPA's Negotiated Rulemaking Activities

Program Evaluation Division
Office of Management Systems and Evaluation
Office of Policy, Planning and Evaluation

December 1987

This report presents the findings of a study of EPA's Negotiated Rulemaking activities. The Program Evaluation Division (PED) conducted the study at the request of the Director of the Office of Standards and Regulations (OSR) in EPA's Office of Policy, Planning and Evaluation (OPPE). OSR is the organizational 'home' of the Regulatory Negotiation Project staff, which conceived and designed the undertaking and is responsible for coordinating, and providing administrative and logistical support to, EPA's negotiated rulemaking activities.

## Section 1: Main message

PED's analysis indicates that negotiated rulemaking can sometimes be better than the conventional rulemaking process. In the 'right' situations, negotiated rulemaking can produce proposed rules that meet statutory requirements but are more pragmatic than proposals EPA would be likely to develop on its own and may produce better environmental results; in addition, negotiated rules are more likely (than conventional rules) to be accepted by the affected industries and other interested parties involved in developing them. Negotiation also may reduce the time it takes to proceed from proposed to final rulemaking. Picking the 'right' situations is critical; frequently undertaking negotiations in cases where it is inappropriate or unlikely to produce consensus could eventually discredit the process.

## Section 2: Background

EPA has about 200 to 250 rulemaking activities underway at all times. Nearly all are conducted in accordance with the notice-and-comment requirements of the Administrative Procedure Act (i.e., 'conventional' rulemaking). In conventional rulemaking, EPA gathers data from various sources and may have informal meetings with interested or affected groups to seek information and/or test ideas. EPA then decides on the content of a proposed rule and publishes it. All interested parties may submit written comments, and, the Agency frequently receives many detailed comments; in addition, the Agency sometimes holds public hearings. After reviewing the comments and any testimony presented at hearings, the Agency must prepare and publish a final rule; doing so usually takes several months, sometimes years. About 80 percent of EPA's final rules are challenged in court.

Four years ago, the Agency announced [1] that it would undertake a pilot-project to investigate the value of negotiated rulemaking, identify the types of regulations most appropriate for negotiation, and determine how best to conduct such negotiations. In negotiated rulemaking, a designated EPA official [2] and representatives of groups interested in and/or affected by a rulemaking activity have a series of meetings in which they attempt to reach consensus on all or the most important features of a proposed rule. This negotiating committee is chartered as an Advisory Committee under the Federal Advisory Committee Act; its plenary and subcommittee meetings are open to the public. To the extent that any consensus reached by the negotiating committee is consistent with the Agency's statutory authority, EPA is committed to using it as the basis of a Notice of Proposed Rulemaking (NPRM).

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[1] Federal Register, February 22, 1983, Vol. 48, No. 36, Pg. 7494.

EPA's criteria for selecting rulemakings for negotiation [3] are aimed at identifying situations in which negotiations have a 'high probability of success.' Toward this end, the criteria reflect a preference for rulemakings in which all or many of the following conditions exist:

- There is a limited number of interrelated issues to be resolved. There are several ways in which they can be resolved. The relevant statutes must accommodate these options.
- There are no serious obstacles to reaching consensus. i.e., the rulemaking will not challenge participants' fundamental values.
- There is a statutory or judicial deadline for completing the rulemaking or some other action-forcing mechanism.
- The prospective participants share common ground on at least some of the issues to be negotiated.
- The costs and benefits of the rulemaking are concentrated on a few entities.
- There are relatively few interested and affected parties—and they are readily identifiable.
- The prospective participants are willing to negotiate in good faith.
- The prospective participants see themselves as having on ongoing relationship with EPA.

Once a proposed rule is published, rulemaking proceeds in accordance with the Administrative Procedures Act and other applicable statutes; that is, the Agency considers public comments and prepares and publishes a final rule. Negotiating committees have played no formal role in final rulemaking; in some cases, however, EPA has informally (but on-the-record) talked with them about the public comments on the proposed rules.

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[2] In the seven negotiated rulemakings undertaken thus far, Office Directors have served as EPA's negotiators four times; in the other three, the EPA negotiator was a deputy Office Director, a division director, and a branch chief.

[3] The Federal Register notice cited in Footnote No. 1 described the selection criteria. Since that time, the only substantive change has been the addition of a statement that the 'parties should view themselves as having an ongoing relationship with the Agency...'.

## Section 3: Purposes and methods of the study

Thus far, EPA has undertaken negotiated rulemaking seven times. PED's study was aimed at determining how well negotiated rulemaking has worked, how it compares with conventional rulemaking, and investigating whether and how EPA could make improvements in its criteria for selecting rulemakings for negotiation. Whether consensus had been achieved was among the factors taken into account in this study, but PED also looked at such questions as whether the negotiations produced better information or better results than the Agency ordinarily gets from the conventional rulemaking process in the pre-proposal stage.

For these purposes, the PED Project Team reviewed relevant materials, including published literature on regulatory negotiation, the documentation of EPA's first two negotiated rulemakings [4] [5], minutes and summaries of the meetings of negotiating committees, texts of negotiated proposals, and other public documents. The Project Team also interviewed many EPA managers and staff members and other people who have participated in the seven negotiated rulemakings undertaken thus far, as well as some of the people who have served as convenors and facilitators.

In performing this assessment of EPA's negotiated rulemaking activities, PED necessarily used people's subjective views as raw material, although interviewees were always asked to provide—and frequently did provide-facts and examples to support their statements. Also, it must be emphasized that a controlled comparison of negotiated and conventional rulemaking could not be made. One of the seven negotiated rulemakings (the one dealing with the process for review and approval of RCRA permit modifications) dealt with the same subject that had been addressed in a previous proposal developed through conventional rulemaking. Another one (i.e. the New Source Performance Standards for residential wood-burning stoves) was at least conceptually similar to the many other New Source Performance Standards developed over the past 15 years. Thus, PED had some empirical basis for comparing conventional and negotiated rulemaking, but, in both instances, the conventional and negotiated proposals were developed at different times and under different regulatory situations.

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[4] Documention of EPA's Non-conformance Penalties Regulatory Negotiated Rulemaking Demonstration. Prepared by Lawrence Susskind and Jerry McMahon. Program on Negotiation, Harvard Law School. January 1985.

[5] Documentation of EPA's Pesticide Exemption Regulatory Negotiation. Prepared by Lawrence Susskind and David Kronenberg. Program on Negotiation, Harvard Law School. July 1985.

Page 4 Negotiated Rulemaking

Section 4: Summary of EPA's negotiated rulemaking activities

Here are descriptions of the subjects of the seven negotiated rulemaking efforts undertaken thus far—together with characterizations of the outcomes.

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| Non-conformance penalties | - Procedures for determination of penalties to be paid by manufacturers of heavy-duty engines that cannot meet EPA standards | Consensus reached on all issues. Final rulemaking has been completed. No litigation. |
| Pesticide emergency exemptions | - Procedures for EPA approval of State requests for emergency use of unregistered pesticides | Consensus reached on exact language of proposed rule. Final rulemaking has been completed. No litigation. |
| Farmworker protection | - Requirements for protective clothing and equipment, warning of hazards, re-entry intervals, and other items | Negotiations broke down. EPA is developing proposed rule. |
| RCRA permit modifications | - Procedures for State/EPA approval of modifications to RCRA permits for hazardous waste facilities | Consensus on all issues, except that one member dissented on one issue. EPA has published proposed rule. |
| Underground injection of hazardous wastes | - Rules for siting, construction, operation, monitoring, and closure of hazardous waste injection wells | Informal agreement was reached on some of the issues. EPA has published proposed rule. |
| Woodstoves New Source Performance Standard | - Emission standards and testing requirements applicable to new residential wood-burning stoves | Consensus reached on exact language of proposed rule. EPA will publish final rule on schedule. |
| Asbestos in schools | - Requirements for identification and mitigation of asbestos hazards in public and private elementary and secondary schools. | Limited accord—with reservations—achieved on many issues. About 150 public comments submitted; many were critical of key provisions of the proposal. |

## Section 5: Findings

FINDING NO. 1: Negotiated rulemaking proposals have been more pragmatic in some respects, and could produce better environmental results in some instances, than those EPA probably would have developed through conventional rulemaking.

Examples supporting this finding are numerous. Even in the case of underground injection of hazardous waste, in which consensus was not reached, EPA's proposed rules are more pragmatic in some respects, and could produce better environmental results, than those the Agency probably would have developed on its own.

### Nonconformance penalties

- In the event of nonconformance, the number of tests to be conducted to determine penalty can range from 4 to 26. Manufacturers have three options for deciding on the number of tests; thus, they can make trade-offs between the number of tests and potential penalties. EPA probably would have required the maximum number of tests in all cases.

- Penalty rates are increased year-by-year. How quickly they increase depends on how much manufacturers use them—the more they are used (i.e., the more often that nonconformance occurs), the more quickly they increase in order to provide incentives for correcting nonconformance. This approach was developed at the negotiating table.

### RCRA permit modifications

- Permit modifications are divided into three classes. Routine modifications having no environmental significance (Class 1 modifications) generally will not require prior State/EPA approval.

- Class 2 permit modifications are automatically approved if the authorized State agency or EPA fails to act within a specified time.

- State/EPA can give a permittee temporary authorization to proceed with facility modifications needed for proper waste managment and/or protection of human health and the environment while the permittee's request for a permit modification is being reviewed.

- Public has opportunities for more informal participation than EPA would have proposed; informal procedures generally are less expensive and less adversarial than formal hearings.

### Underground injection of hazardous wastes

- The provisions of the proposed rule—including those defining and setting conditions for demonstrating 'no migration'—are more comprehensive and explicit than they otherwise would have been.

- The use of fluid seals will be allowed under certain conditions; EPA had not planned to allow them, but information brought to the negotiations satisfied the Agency that fluid seals are sometimes adequate.

- Requirements for groundwater monitoring around hazardous waste wells will be worked out case-by-case in accordance with criteria set forth in the proposed rule. EPA had planned to require well owners/operators to conduct monitoring in accordance with prescribed regimes.
- The area that must be checked for the presence of abandoned wells will be larger than EPA had planned to propose.
- Post-closure care provisions are included; EPA had not planned to include such provisions.

Woodstoves NSPS

- Manufacturers agreed to comply with the proposed standards by mid-1988--at least two years earlier than they could have come into compliance if they had waited for issuance of final standards. They were willing to agree to quicker compliance based on confidence in the consensus achieved by the negotiating committee.
- Manufacturers must perform self-audits of selected woodstoves coming off their production lines, but they will not be subject to 'look-back' penalties if any models later are found in violation. EPA will have the right to test some production-line woodstoves to assure that manufacturers' testing is reliable.
- Manufacturers already certified in Oregon are exempt from additional testing to demonstrate compliance with EPA's initial standards.
- One-year certification of compliance is automatic if a manufacturer encounters delays in getting testing done or getting EPA to review test results.
- The negotiating committee came up with a method of measuring emissions that is more accurate than the one EPA had suggested.

FINDING NO. 2: Negotiations have facilitated exchanges of information and understanding of the issues in dispute.

Participants in all of EPA's negotiated rulemaking efforts came away with new information (i.e., information they previously did not have and in some cases did not even know existed). EPA was a major beneficiary of this information flow.

In the RCRA, UIC, Farmworker Protection, and Asbestos efforts in particular, many of the participants provided information and insights about 'real world' practices and conditions that helped guide the negotiating committees toward pragmatic regulatory requirements.

In the Asbestos rulemaking, some participants brought in expert consultants who made significant contributions and previously had been unknown to EPA.

Even where consensus has not been achieved, at least some participants thought the negotiations were beneficial in terms of communication. Five people who represented environmental groups in the abortive negotiations on Underground Injection of Hazardous Waste commented: 'We believe that the negotiations have been worthwhile, have increased understanding of the issues and of the various parties' perspectives, and have stimulated communication among all involved' [6]. Regarding the same undertaking, the president of the Chemical Manufacturers Association (CMA) said that CMA's Underground Injection Control Task Group 'believes the process was extremely productive in facilitating an exchange of technical information' [7].

FINDING NO. 3: Developing proposed rules through negotiation has made final rulemaking easier and less costly.

Going from proposed to final rulemaking has been easier and less resource-intensive than it ordinarily is. This was true in the NCP. Pesticides Emergency Exemptions, and Woodstoves NSPS rulemakings. For the Woodstoves NSPS, the Office of Air Quality Planning and Standards will spend about one-half as much time and money as it ordinarily would expect to spend for additional data collection and analysis in order to respond to public comments; this represents a saving of about $150K. Even more significant is the fact that final rulemaking will be completed on schedule, which is not often the case with EPA rulemakings. Based on the Woodstoves NSPS experience, it appears that it is easier to obtain EPA management concurrence in a negotiated rule than in one developed through the conventional process.

FINDING NO. 4: Working relationships developed during negotiations have helped some of the participants work together constructively in other situations.

Two of the participants in the RCRA permit modifications effort--one who represented a public interest law firm and one who represented a chemical company--are working together to find a mutually satisfactory means of enabling the chemical company to undertake an activity that the public interest law firm ordinarily would have opposed.

Participation in the Woodstoves NSPS negotiations has helped Oregon officials improve their relationships with woodstoves manufacturers and thus enabled them to implement the State's woodstoves standards more easily.

The Nonconformance Penalty negotiations helped pave the way for a recent agreement among EPA, environmental groups, and automobile manufacturers on temporarily relaxing particulate emission standards while the manufacturers develop new control technology that will enable them to meet standards more stringent than those originally contemplated.

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[6] Letter dated May 4, 1987 to Michael Cook, Director of EPA's Office of Drinking Water from representatives of the Natural Resources Defense Council, the Kern County Valley Action Network, the Environmental Task Force, the Legal Environmental Assistance Foundation, and Environmental Policy Institute.

[7] Letter dated May 29, 1987 to the EPA Administrator from Robert A. Roland, president of the Chemical Manufacturers Association.

FINDING NO. 5: Experience thus far has reaffirmed the basic premise underlying EPA's pilot-project, i.e., that negotiated rulemaking would be useful in selected situations. Negotiated rulemaking is an appropriate, and potentially effective, means of formulating regulatory policy in some situations. PED's conclusions regarding the circumstances under which negotiated rulemaking works best are presented in the next section. The following 'administrative' factors also affect the frequency with which negotiated rulemaking can be undertaken:

- Negotiated rulemaking is labor-intensive and thus can be burdensome not only for EPA but also for environmental groups, some trade associations, and States. EPA managers who have been the Agency's negotiators have devoted far more time to the negotiations in which they were involved than they ordinarily would spend on a single rulemaking effort. In one case (the NCP negotiations), a division director and two branch chiefs put in significant time.

- Coordination within EPA and with the Office of Management and Budget (OMB) [8] is more critical in negotiated rulemaking than in conventional rulemaking, because the negotiating committee must be confident that the EPA negotiator is speaking for the Federal Government. This coordination process must keep up with (and not delay) negotiations; if Federal agencies delay negotiations in order to coordinate, they can hardly expect other participants to stick to established schedules for negotiations. This far, coordination has not caused any delays.

- Negotiated rulemaking generally will not enable EPA to cut back on pre-proposal data-collection and analysis. EPA cannot depend on other participants to provide all the needed data, especially not on matters such as health and environmental risks. In the Woodstoves NSPS case, however, OAQPS was able to forego some data-collection and analysis, but the resource saving was small. OAOPS still spent more than $1 million gathering and analyzing data before the negotiations began; indeed, the fact that so much work had been done in advance was critical, because it enabled the OAQPS staff to evaluate what participants were saying and to respond to questions about technical and economic issues.

- Negotiated rulemaking heightens people's expectations and therefore is sensitive to 'upsets.' Failure to reach consensus, particularly if negotiations are contentious, may leave participants disappointed and may worsen EPA's relationships with some of them.

- Non-profit groups may be at a greater-than-usual disadvantage in terms of access to expertise. They ordinarily do not have large 'in-house' staffs of technical experts. To get expert assistance in responding to conventional rulemaking proposals, they often send materials to experts who review them in their own homes or offices and send back written comments. Non-profit groups cannot ordinarily afford to hire many experts to accompany them to negotiation meetings (as industry groups can). This disadvantage can be overcome to some extent by allowing non-profit groups to use the resource pool (created for each negotiated rulemaking) to bring appropriate consultants.

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[8] Under Executive Order 12291, OMB has authority to review EPA's rulemaking activities. In conventional rulemaking, OMB review normally takes place after the Agency has developed, but before it has published, proposed or final rules. In negotiated rulemaking, EPA's commitment to basing proposed rules on consensus recommendations from a negotiating committee means that consultation with OMB must take place during negotiations. OMB analysts have been present as observers at many negotiated rulemaking sessions but they usually have not taken part in the discussions. PED saw no indication that OMB's role in review of negotiated rulemaking proposals has differed from its role in conventional rulemaking.

FINDING NO. 6: All affected interests generally have been identified and represented. As a practical matter, affected interests must be organized in order to have an opportunity to participate in negotiations. Within this limitation. PED noted only two instances in which affected interests were not fully represented:

- In the Woodstoves NSPS negotiations, nobody representing truly small woodstove manufacturers was involved. EPA had identified someone to play this role, but his company went out of business before the negotiations began.

- In the Asbestos case, representatives of States' Attorneys-Generals' offices in litigation with asbestos product manufacturers did not become involved in the negotiations until the process was well underway.

FINDING NO. 7: EPA has based its selections of rulemakings for negotiation partly on the existing selection criteria and partly on Program Managers' judgments.

The Agency's first seven choices of rulemakings for negotiation reflect varying degrees of reliance on the selection criteria, tempered in some cases by Program Manager's judgments that negotiations would be worthwhile even though full consensus might not be achieved.

- In all instances, there has been a relatively large number of issues to be resolved, but that has been a real impediment only in the Asbestos negotiations, in which time limitations, as well as a large number of issues, made the process extremely difficult.

- There were action-forcing mechanisms in nearly all cases (e.g., deadlines established to settle litigation in Non-conformance Penalties and Woodstoves NSPS; statutory deadlines, coupled with 'hammer' provisions, in Underground Injection of Hazardous Waste and Asbestos; concern about possible 'gridlock' in review of RCRA permit modifications). Only in the Farmworker Protection case was there no effective action-forcing mechanism; EPA had set a deadline for completing negotiations, but missing the deadline had no unacceptable consequences for any of the participants.

In both the Farmworker Protection and Underground Injection of Hazardous Waste cases, the EPA Program Managers who initiated the negotiations recognized that there were serious obstacles to achieving full consensus. In both instances, however, they believed there were good reasons to proceed, including the possibility of reaching consensus and/or bringing the parties closer together on some issues and the opportunity to learn more about 'real world' conditions relevant to the rulemaking. Similarly, in the Asbestos case, the Program Managers recognized the risk that consensus would not be reached, particularly because of the limited time available and the large number of issues, but they made a judgment that negotiations would nevertheless be worthwhile, since the process would involve many of the same groups that had worked together during Congressional consideration of the underlying legislation.

Section 6. Questions not answered by this study

PED could not answer two of the questions that have been raised about EPA's negotiated rulemaking activities:

- Whether it results in a net saving of EPA resources could not be determined, and, perhaps, can never be determined, because the Agency does not keep records of its resource utilization separately for each rulemaking effort; EPA generally has no need for such detailed data. Based on this study, it appears that pre-proposal costs are reduced only slightly, if at all. If, however, final rulemaking is easier, there may be some savings. If litigation is avoided, and if affected industries' acceptance of the rulemaking produces a high degree of voluntary compliance, all parties may reap substantial savings.

- Whether the risk of litigation is reduced will be difficult to determine until EPA has completed final rulemaking in several more cases. There has been no litigation dealing with the first two negotiated rulemaking efforts (and litigation on the Woodstoves NSPS seems unlikely), but it obviously is impossible to predict what will happen with respect to those cases in which rulemaking has yet to be completed. Even where there is litigation, it seems possible that negotiations will have reduced the number of issues to be decided.

Section 7. General observations—Pro and con

In addition to answering PED's questions about the seven negotiating rulemaking efforts in which they were involved, many interviewees offered some general observations about the negotiated rulemaking process.

EPA managers

EPA managers who have served as the Agency's negotiators think negotiated rulemaking is worthwhile. Even those who were involved in negotiations in which full consensus was not achieved believe the Agency obtained valuable information and brought opposing 'sides' closer together.

- They said they would be willing to do it again—given appropriate rulemaking situations—provided that their personal time investment can be limited.

- Office Directors, in particular, said they cannot routinely devote so much of their time to a single rulemaking activity, but they recognized the importance of personal involvement at the outset and accessibility throughout the process, especially when major issues are being addressed.

### Other participants

Many of the non-EPA participants indicated that they like negotiated rulemaking because they believe it provides unique opportunities to have direct dialogue with EPA decision-makers [9], to hear other parties' concerns and explain their own, and to present data and arguments before an EPA proposal polarizes the interested parties.

On the other hand, many non-EPA participants have reservations about negotiated rulemaking.

- Pressure to reach consensus makes many people uncomfortable. Some interviewees expressed concern that negotiations could result in 'weaker' regulations. Others took the opposite view—that negotiations may force regulated industries to make concessions and accept restrictions they would resist in conventional rulemaking. [10]

- Some interviewees took the position that 'anything' could be negotiated, but most raised questions about the appropriateness of negotiated rulemaking in certain situations (e.g., those involving 'life and death' issues [10]).

- Many interviewees voiced at least some concern about the time required for participation in negotiated rulemaking. An official of one trade association noted that even though he works for a large organization, he is the only person working full-time on environmental issues and therefore cannot afford to become involved very often in negotiated rulemaking. Staff members of environmental groups and other organizations have similar concerns.

- Several interviewees wondered what role OMB plays in negotiated rulemaking and how EPA interacts with OMB; people who raised such questions usually added that they assumed (correctly) that EPA-OMB coordination was taking place even though it was not visible to them.

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[9] There is an apparent inconsistency between top managers' desire to limit the time they spend at the negotiating table and other negotiators' preference for talking directly with EPA decision-makers. Subordinate officials may be able to substitute successfully for top managers if the subordinates are, in fact, involved in dealing with the issues being discussed and are perceived (by other negotiators) as having the EPA negotiator's confidence.

[10] In an article that appeared August 3, 1987, in Legal Times, EPA's use of negotiated rulemaking was attacked on the ground that the Agency uses this approach to 'strike deals' among the interested parties without regard to statutory requirements. The authors, Rena Steinzor and Scott Strauss, were not among the people PED interviewed. Mr. Strauss was a participant in the Asbestos negotiations. None of the people PED interviewed expressed such views.

[10] This characterization came not from an interview but from a memorandum prepared by David Doniger of the Natural Resources Defense Council and dated November 15, 1983, in which he asked staff members of other environmental groups to suggest topics appropriate for negotiated rulemaking.

Section 8: Conclusions

EPA's experience thus far suggests that negotiated rulemaking will work best (i.e., most likely result in consensus on proposed rules) when all or most of the following conditions exist:

- Rulemaking involves 'second-tier' rules affecting program implementation—rather than rules establishing program structure. The RCRA Permit Modification and Non-conformance Penalty rules are excellent examples of 'second-tier' rules.

- Rulemaking does not involve any extremely controversial national policy or complex multi-media issues. How to define 'no migration' from hazardous waste injection wells was just such an issue. Rules setting national standards often will involve extremely controversial issues. The Woodstoves NSPS rulemaking did not; in addition. it related only to air quality.

- The principal parties have (or can reasonably be expected to agree upon) common goals. For example, participants in the RCRA rulemaking were united in wanting to reform the process for review of permit modifications; participants in the Woodstoves NSPS rulemaking all supported the adoption of national standards; and participants in the Non-conformance Penalty rulemaking were all interested in promoting compliance (rather than in making non-compliance cheap).

- The policy implications of the issues to be resolved are more-or-less limited programatically, i.e., the rulemaking will not establish precedents that will be binding in program areas not encompassed by the negotiations. This was a problem in the case of Underground Injection of Hazardous Wastes.

- Where complex scientific and technical issues must be resolved. the necessary data should be readily available. While negotiators may bring some relevant data to the table. negotiated rulemaking is certainly not the only way, nor is it necessarily the best way, to obtain data, especially detailed scientific and technical data on the nature and extent of health and environmental risk and on the technological and economic feasibility of alternative solutions.

- Ongoing litigation should be carefully analyzed to ensure that it will not affect participants' willingness or ability to engage in genuine give-and-take. In the Asbestos rulemaking. representatives of the parties involved in litigation could not accept an outcome that would prejudice their case.

- The time available for negotiations is adequate. PED has concluded that the length of intervals between negotiating meetings is the best measure of the adequacy of time for negotiations. It must be long enough to allow participants to digest and reflect on what has taken place, to talk to the another informally (if they wish), to consult the groups they represent, and to prepare for upcoming meetings. In most of the negotiated rulemakings EPA has undertaken, this interval generally has been four weeks, which has been adequate. In the Asbestos rulemaking, meetings were held every two of three weeks, in an effort to meet a statutory deadline; this haste may have been a factor contributing to the ambiguous outcome of the negotiations.

Whether 'acceptable risk' issues are involved is another factor to be considered when EPA is deciding whether to undertake negotiated rulemaking. The more important it will be to choose an 'acceptable risk' level, the more difficult it will be to reach consensus; indeed, where 'acceptable risk' is a central issue, many interested parties may be unwilling to negotiate.

## Section 9: Recommendations

Negotiation is appropriate and potentially fruitful in some of EPA's rulemaking efforts.

Deciding when negotiated rulemaking would be particularly useful is obviously the key. Toward this end, additional criteria based on PED's conclusions as to 'Where it works best' could be helpful. But EPA cannot depend solely on selection criteria. Even where all or most criteria are met, consensus will not necessarily be achieved. EPA's top managers still will have to make judgment calls about the selection of candidates for negotiated rulemaking.

Because negotiated rulemaking is a highly visible process, and because an agreement (in advance of negotiations) to base a rulemaking proposal on the consensus achieved by a negotiating committee is binding on the Agency, either the Administrator or Deputy Administrator should continue to be involved in decisions to negotiate. An elaborate decision-making process is not necessary, but the Administrator or Deputy Administrator should at least be made aware of:

- The extent to which the rulemaking in question meets whatever selection criteria the Agency is using

- The risk of not achieving the objectives of any negotiated rulemaking effort

- Whether any alternative procedures would be more likely to meet the objectives

- The likely consequences of failure to reach consensus

- Whether satisfactory arrangements have been made for coordination within EPA and with other Federal agencies

In short, negotiated rulemaking is likely to be worthwhile where the conditions for success seem to exist and where EPA managers and other interested parties are able and willing to devote the necessary time and energy.

# CHAPTER 2 - WHEN TO USE NEGOTIATED RULEMAKING

## Evaluating a Rule's Suitability for Negotiated Rulemaking

Not all rules are suitable for negotiated rulemaking, and the criteria for a good candidate may vary from one program to another in the federal government. The reasons to negotiate a rule may derive from a desire to reduce litigation or contentiousness, or from a desire to increase public participation in particular rulemaking proceedings.

As a prerequisite to establishing a negotiated rulemaking committee, the Negotiated Rulemaking Act requires a determination by the agency head that the use of the procedure will be in the public interest. The Act lists several considerations for making this determination: (1) a need for the rule; (2) a limited number of identifiable interests that will be significantly affected; (3) a reasonable likelihood that an appropriately balanced and representative committee can be convened whose members are willing to negotiate in good faith to reach a consensus; (4) a reasonable likelihood of reaching a timely consensus; (5) the process will not unreasonably delay the issuance of the rule; (6) the agency will commit adequate resources; and (7) the agency will commit to publishing any resulting consensus as a proposed rule. (See 5 U.S.C. §563, reprinted in chapter 3.)

These basic statutory considerations may be supplemented by a number of additional conditions that should guide the agency in deciding whether reg-neg is appropriate in a particular instance. (See Administrative Conference Recommendation 82-4 in the appendix to chapter 1; and Harter, *Negotiating Regulations: A Cure for Malaise*, in chapter 13.) The following list is taken from testimony on S. 1504 by Philip J. Harter, before the Senate Committee on Governmental Affairs, May 13, 1988:

- **A limited number of interests will be significantly affected, and they are such that individuals can be selected to represent them.** A rule of thumb is that no more than twenty-five people would have to participate at any one time, although each interest may be represented by a caucus or "team." Discussions can become unwieldy if there are many more than that. While this may seem like a small number and hence a significant limitation, only a few parties play the significant roles in most major rulemakings. The process would not be appropriate, however, if a major interest is not sufficiently organized so that a representative can be selected. (Note that 5 U.S.C. §565(b) specifies a maximum of 25 members unless the agency determines that a larger number is necessary.)

- **The issues are known and ripe for decision.** The parties would not likely grapple with issues that are only emerging and are neither well defined nor imminent for decision. Thus, the matter must be sufficiently developed so the participants can focus on relatively well crystallized issues: it is on the action agenda.

- **No party will have to compromise a fundamental value.** Negotiations are not appropriate if a party would be required to violate something it holds as a fundamental precept. While the issues presented for agreement can be major and important, if they rise to the level of faith, agreement is unlikely. Such issues need to be resolved in some other forum.

- **The rule involves diverse issues.** The parties will likely not agree if only one issue is presented. The advantage of negotiations is a type of "Jack Sprat" rulemaking -- what may be critical to one party may well not be so important to another. Thus, the parties can rank the issues according to their respective needs and priorities and thereby attempt to reach an accommodation. Doing so requires that the rule in question raise a range of issues or approaches.

- **The outcome is genuinely in doubt.** If a party has the raw power -- through political influence, a commanding position on the relevant facts, or bargaining strength -- to dictate the results of the proceeding, it would likely be inappropriate to use a consensus process. Those without direct power would generally need the formal structure of the rulemaking process to protect their interests or to alter the relative power balance. If, however, there is sufficient countervailing power so that no party can achieve its goal without incurring a sanction it views as unacceptable, the process would be a suitable way of reconciling those positions and avoiding the impasse.

- **The parties view it as in their interest to use the process.** Negotiation is a voluntary process parties engage in because they believe they will be able to achieve more by doing so as opposed to using some other means to pursue their desires. A party that feels forced to the table may go through the motions of participation, but it will likely not be a full, creative participant and may take actions subsequently to attempt to scuttle the product of any discussions.

- **The agency is willing to use the process and participate in it.** Experience shows rather dramatically that any agency can find creative ways to sabotage a process it does not like. Thus, even if the private groups met and developed a recommendation, the agency may well reject it as a result of the "not invented here" syndrome or a concern that the "proper" balance was not struck. . . . [T]he agency must believe the direct discussions are an appropriate way to develop the proposal. Moreover, a senior official, generally the one who would be responsible for developing a draft rule inside the agency, should participate as a full member of the negotiations so that the agency's views can be incorporated in the deliberations and the agency feels a part of it.

The following important factors may be added to the foregoing list:

- **No one interest should be able to dominate the proceeding.** All participants must feel that their concurrence in any agreement is essential.
- **There should be a deadline for achieving consensus.** A reasonably firm deadline for conclusion of negotiations will help the participants to keep moving toward a resolution at an efficient pace. The deadline may be externally imposed by statute or court order, or may be set by the agency.

From the time the Administrative Conference adopted its initial reg-neg recommendation in 1982 through mid-1995, approximately 50 negotiated rulemaking proceedings have been undertaken by federal agencies. Each agency has applied the above conditions in its own way to select appropriate rules, sometimes with additional conditions. The Environmental Protection Agency decided very early to institutionalize its negotiated rulemaking program and drafted its own selection criteria, which are included in the appendix. Approximately one-third of federal negotiated rulemaking proceedings have been conducted by EPA.

## How Is Negotiated Rulemaking Proposed?

How does a rule come to be considered for negotiated rulemaking? Proposals may originate with agency staff, external affected parties, or by congressional direction. The Administrative Conference believes that regulatory agencies usually should determine whether to use negotiated rulemaking in particular cases. (See Recommendations 82-4 and 85-5 in the appendix to chapter 1.) In some instances, however, Congress has made this judgment and has mandated use of reg-neg. Agencies affected by such legislation include the Nuclear Regulatory Commission and the Departments of Education, Health and Human Services, Housing and Urban Development, and the Interior. (See chapter 10 for information about individual reg-negs that have been required by statute.)

The first EPA negotiated rulemaking proceedings were selected after the agency solicited suggestions from the public through a Federal Register notice and other efforts (see appendix). EPA published a similar notice again in December 1988. A few other agencies have also issued such invitations to the public to suggest candidates. Some reg-negs have come from unsolicited proposals received from industry or public interest groups that wanted to increase the effectiveness of their participation in the drafting of a rule. Some rules have been identified by agency rulemaking staff or management interested in augmenting in an organized way their normal process for consultation with the regulated community. This has occurred, for example, in connection with efforts of the Clinton Administration and the National Performance Review directed toward increasing public participation in governmental activity.

Only one agency, EPA, has institutionalized negotiated rulemaking with a full time staff to evaluate candidates and manage the process. EPA's Consensus and Dispute Resolution Program, located in the Office of Policy, Planning and Evaluation, is responsible for a systematic evaluation of rules under development for possible negotiated rulemaking. Program staff members make recommendations to the rulemaking staff with regard to the appropriateness of particular rules for negotiation. When evaluating a rule, EPA considers a broad spectrum of public consultation processes, not just negotiated rulemaking. The Program also provides staff and contract assistance to rulemaking offices in setting up and managing negotiated rulemaking proceedings.

## Appendix

The appendix contains EPA's criteria for selection of cases for which negotiated rulemaking will be used. Also included are documents illustrating two approaches to generating nominations of candidate regulations for reg-neg -- a letter from John McGlennon seeking suggestions from a targeted audience, sent on behalf of EPA, and a notice that EPA placed in the Federal Register requesting such information from the general public.

For further discussion of alternative methods of building a consensus, refer to the document in the appendix entitled "Discussion on the Use of Consensus-Building Processes for Implementing the Clean Air Act of 1990," prepared for EPA by the Keystone Center.

## EPA REGULATORY NEGOTIATION CANDIDATE SELECTION CRITERIA

It is important to screen potential rulemakings to identify instances where negotiation of the rule has a high probability of successful use. The Regulatory Negotiations Project uses the following criteria to screen and select appropriate items. We developed them based both on a thorough review of the considerable literature on the use of negotiations to resolve a wide range of environmental disputes and on a careful analysis of instances in which regulatory negotiations have been used. An item need not meet all of these criteria to be qualified as a candidate.

Criteria for the Item

- o The proposal should require the resolution of a limited number of interdependent or related issues, none of which involve fundamental questions of value, or extremely controversial national policy. Rulemaking that involves 2nd tier, "how-to" implementing rules may be more likely to be successful.
- o The policy implications of the issues to be resolved are more-or-less limited programmatically, i.e., the rulemaking will not establish binding precedents in program areas not encompassed by the negotiations. Complex multi-media issues may be difficult to resolve.
- o There must be a sufficiently well-developed factual base to permit meaningful discussion and resolution of the issues.
- o There should be several ways in which the issues can be resolved.
- o There should be a firm deadline imposed upon the negotiations by EPA due to some statutory, judicial or programmatic mechanism. The deadline should provide adequate time for negotiation of the issues.

Criteria for the Participants

- o Those participants interested in or affected by the outcome of the development process should be readily identifiable and relatively few in number. Participants should be able to represent and reflect the interests of their constituencies.
- o The parties should have some common goals. They should be in good faith about wanting to participate in negotiations. They should feel themselves as likely, if not more likely, to achieve their overall goals using negotiations as they would through traditional rulemaking.
- o Some of the parties should have common positions on one or more of the issues to be resolved which might serve as a basis for agreement during the course of negotiations.
- o The parties should view themselves as having an ongoing relationship with the Agency beyond the item under consideration.
- o Any ongoing litigation does not inhibit the parties' willingness or ability to engage in genuine give-and-take.

## 48 Fed. Reg. 7494 (Feb. 22, 1983)

[OPRM-FRL 2310-1]

### Regulatory Negotiation Project

This Notice announces that the Environmental Protection Agency is beginning a "Regulatory Negotiation" project. Regulatory negotiation may provide an alternative to our traditional adversary rulemaking procedures—an alternative that better conserves time and resources and minimizes costly litigation.

The purpose of the project is to test (1) the utility and value of developing regulations by "negotiation", (2) the types of regulations which are most appropriate candidates for negotiated rulemaking, and (3) the procedures and circumstances which foster the most effective negotiations.

Readers are invited to suggest EPA regulations as candidates for Regulatory Negotiation. In preparing their suggestions, readers should refer to the selection criteria found at end of this announcement. Send your suggestions by (30 days from the date of publication) to: Chris Kirtz, Director, Regulatory Negotiation Project, U.S. Environmental Protection Agency, 401 M Street, SW. (PM-223), Washington, D.C. 20460, (202) 382-7565.

**Joseph A. Cannon,**
*Associate Administrator for Policy and Resource Management.*

### Regulatory Negotiation Project Description

*Introduction:* EPA is beginning a demonstration project to test an approach to rulemaking that is frequently referred to as "Regulatory Negotiation". For two selected rules, the project will use face-to-face negotiations among interested parties in place of EPA's usual regulation development process. In each case, the goal of the negotiations will be a Notice of Proposed Rulemaking that reflects a consensus on how to address the environmental problem presented.

The impetus for the project is the hope that there are more efficient ways to regulate than the current adversarial system of rulemaking. The project will

**7495**

explore whether negotiation at this early stage of rulemaking can produce rules more quickly, less expensively, and with less likelihood of litigation.

*Request for Suggestions:* We invite interested parties to suggest EPA items for negotiation, using the attached selection criteria to help identify topics that are likely to be negotiable. After considering the suggestions from outside parties together with those from within EPA, we will select two rules to develop by negotiation during the project.

### Project Design

*Management:* The Regulation Management Staff (RMS) designed the project and will administer it on EPA's behalf. RMS is a part of the Office of Standards and Regulations in the Office of Policy and Resource Management and is responsible for managing the regulation development process.

*Participants:* A person designated by the lead program EPA office with line responsibility for developing the regulation (supported by a small EPA negotiating "team") will actually negotiate as a party-in-interest for EPA. As would any party to a negotiation, EPA representatives will work closely with their management to assure that they accurately represent the Agency.

Parties to a particular negotiation will be a function of the rule selected and the interests affected by the possible results. Parties representing legitimate and definable interests are appropriate to negotiate on behalf of their constituencies. Every effort will be made to identify these parties and bring them to the table.

*Procedures:* Apart from the procedural rules the parties themselves agree to, the negotiations will be conducted as an Advisory Committee function under the Federal Advisory Committee Act (FACA). An Advisory Committee

Charter has been prepared and will be filed with the appropriate bodies. Under the provisions of FACA, certain meetings may be closed to non-members. These provisions will be used where the law allows and the parties agree on the need for confidentiality to carry on the negotiations.

It is important to note that negotiations are a step in the "informal notice and comment" administrative procedures EPA uses presently. Participation by itself does not involve the waiver of a party's right to pursue any alternative to negotiation, including litigation, at any time before or after EPA issues a final rule.

*Outside Support:* During the first negotiation, a contractor experienced in using third-party intervention techniques to resolve environmental disputes will assist EPA in selecting a topic, identifying the parties, and conducting the negotiation itself. The contractor will work with the Regulation Management Staff to move the demonstration along, and to enable that staff to perform its third-party role for the second negotiation.

*Documentation:* Documenting this demonstration project is extremely important. The demonstration will produce valuable information both generally on developing regulations by negotiation and more specifically on conducting the negotiations themselves in the context of Federal rulemaking. EPA has engaged the Harvard Negotiation Project to design an information gathering/documentation system that will allow us to capture all this information without disrupting the negotiation process under study.

We anticipate that the project will take a year or so to complete and we then plan to publish and distribute a report summarizing our findings and conclusions.

*Selection Criteria:* Because negotiation is not suitable for every situation, it is important to screen potential rulemakings to identify where this approach has a high probability of success. A few, simple criteria that predict the existence of a number of preconditions conducive to successful negotiations can be applied when selecting those topics.

These criteria were developed after a thorough review of the considerable literature on the use of negotiation to resolve a wide range of environmental disputes.

*About the Regulation*

- The proposal requires the resolution of a reasonably limited number of interdependent or related issues. There are several ways in which the issues can be resolved. The relevant legislation accommodates these alternative outcomes. There are no serious obstacles to implementing a negotiated solution.
- There is a legislative or judicially imposed deadline or some other mechanism forcing publication of a rule in the near term, i.e. 8 to 12 months, that would promote a timely resolution, and limit a party's ability to gain from delay.
- Some or all of the parties have common positions on one or more of the issues to be resolved that might serve as a basis for additional agreements during the course of negotiations.
- The costs and benefits are narrowly concentrated on a few entities.

*About the Parties*

- Those parties interested in or affected by the outcome of the development process are readily identifiable and reasonably few in number (10–15). They have sufficient resources to take an active role in negotiations. They have relatively equal power to affect the outcomes.
- The parties are likely to participate in negotiations as an alternative to litigation. They are more likely to achieve their overall goals using negotiation rather then existing alternatives.

[FR Doc. 83–4376 Filed 2–18–83; 8:45 am]

BILLING CODE 6560–50–M

environment
economics
energy

Clark-McGlennon Associates, Inc.
148 State Street
Boston, MA 02109
(617) 742-1580

February 16, 1983

Mr. Alan Morrison
Public Citizen Litigation Group
2000 P Street, NW
Washington, DC 20036

Dear Alan:

The U.S. Environmental Protection Agency has recently retained Clark-McGlennon Associates to assist in a unique demonstration project using negotiation in the development of regulation. Clark-McGlennon Associates is a Boston-based governmental consulting firm specializing in environmental conflict management. The project will test whether and under what conditions negotiation can be used in regulation development. A more detailed description of this undertaking is contained in the enclosed Project Description.

The project is an important one that would allow EPA to gather information which may positively affect future rulemaking procedures. It is my hope you will see this as an opportunity to work collaboratively with the EPA on what promises to be an exciting project.

An important first step is to identify candidate regulations which may be appropriate. Clark-McGlennon Associates is therefore contacting organizations like yours that are frequently involved in the development of regulations to solicit your suggestions. In particular, we would like to encourage your organization to suggest one or more regulations for consideration. This could be a regulation which is to be proposed or an amendment to an existing regulation. We have prepared a simple form (attached) to assist you with this. Factors that you should consider in suggesting candidate rules include:

- there are a manageable number of issues and parties
- there is a deadline for the development of the rule
- the key parties are likely to participate in a negotiation process in good faith

(More detailed selection criteria are presented in the Project Description.)

Page Two

Approximately two weeks after your receipt of this letter Peter Schneider, a Senior Associate at Clark-McGlennon, or I will call you to answer any questions you might have and discuss candidate rules. Thank you in advance for your participation.

Sincerely,

John A. S. McGlennon

JASM:jth

enclosures: Project Description
Candidate Rule Form

Clark-McGlennon Associates, Inc.

## EPA REGULATORY NEGOTIATION PROJECT

### CANDIDATE RULE

When suggesting a rule for consideration, bear in mind the rule selection criteria in the Project Description.

---

**Brief Description of Rule:**

**Why Is This Rule Important to Your Organization?**

**Which Parties Are Involved/What Are Their Interests?**

**Are the Parties Prepared to Bargain in Good Faith ror Consensus at This Time?**

**Other Comments or Suggestions:**

Completed by:______________________________
Name
______________________________
Address
______________________________
Phone

Send completed forms to:

Clark-McGlennon Associates
148 State Street
Boston, MA 02109
(617) 742-1580

# Discussion

# on the

# Use of Consultation and Consensus-Building Processes

# for Implementing the Clean Air Act of 1990

Office of Air And Radiation

U.S. Environmental Protection Agency

(Prepared for EPA by the Keystone Center)

Revision Date: March 4, 1992

## I. Introduction

The purpose of the enclosed materials is to describe several alternative approaches for consulting with external interests as EPA develops regulations that implement the Clean Air Act. All approaches assume that the overall goal of the rulemaking process is to produce rules that are not only technically sound, fair, and effective, but have the greatest likelihood of being legally defensible and implementable (thereby achieving environmental results in a timely and efficient manner). In order to achieve this goal, EPA should ensure that three types of concerns are addressed by appropriate members of the Agency in conjunction with each rulemaking effort:

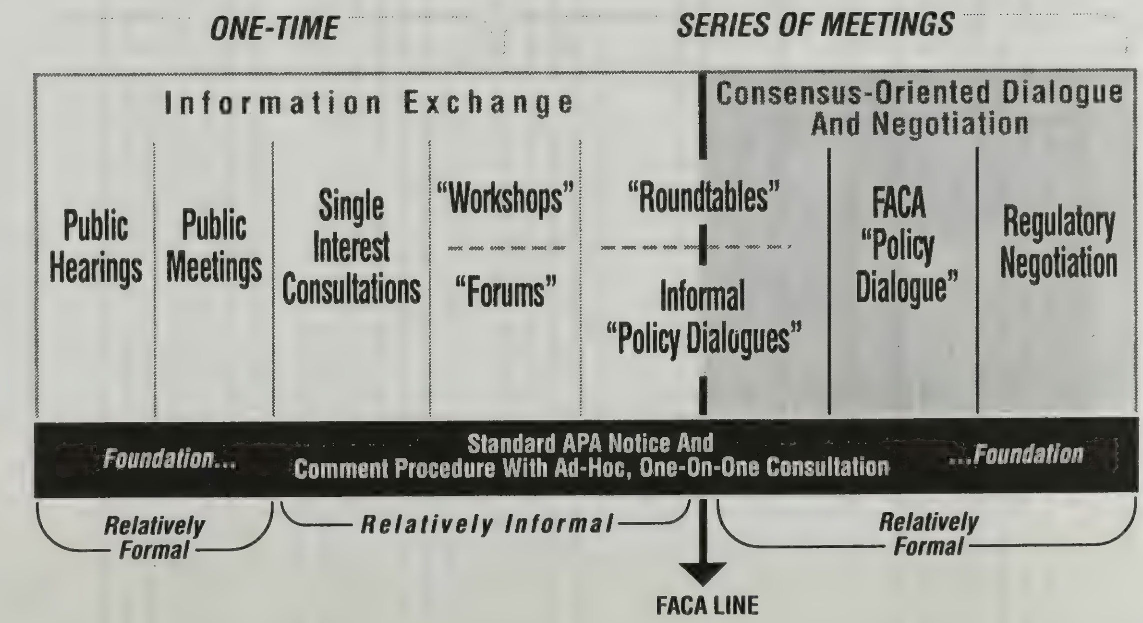
- **Technical:** What are the relevant technical issues of concern and how can they be resolved?
- **Procedural:** What potential procedural issues may interfere with implementation of the rule?
- **Political:** Who has the power to influence or block implementation of a proposed rule? How have their concerns been responded to, accounted for, or addressed?

If, at the close of a rulemaking process, significant issues of concern to major interest groups remain in any of these three categories, it is more likely that the rule will not be implemented on time. Therefore, these questions should be carefully considered by each member of the EPA rulemaking work group and other appropriate EPA staff, both at the outset and at critical junctures in a specific rulemaking effort.

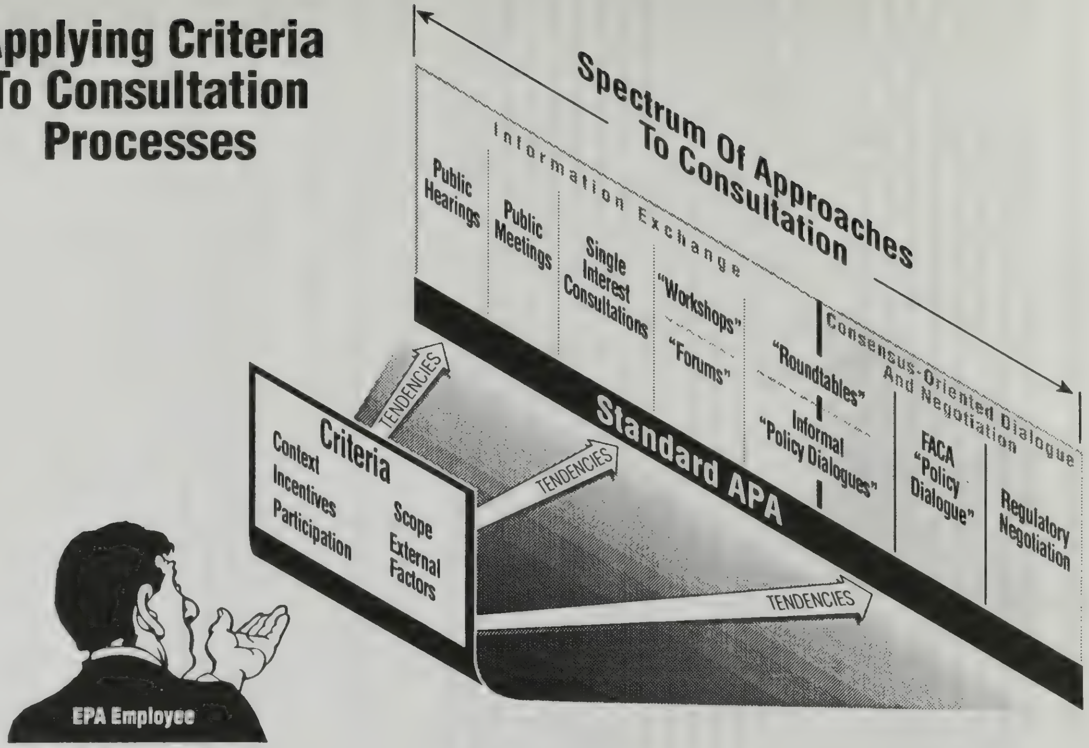
Assuring that there are adequate answers to all of the questions posed will not "guarantee" a positive outcome. There are potential negative consequences to attempting some of the processes. For example, some of these processes can consume agency time and resources. They can create additional expectations from participants (e.g. that EPA will incorporate all of their comments into a proposal). However, answers to the questions above should inform the design and outcome of the rulemaking process whether a consultation process is pursued or not.

In Part II below, a description of five parts of the consultation process spectrum is provided. In Part III, criteria for selecting an appropriate process are provided. Part IV presents tendencies in the application of criteria to the choice of consultation processes. Part V provides a checklist of key factors to be considered before initiating any consultation process. The graphics which follow portray how the criteria and tendencies described in Parts III and IV can be used by EPA staff to determine which consultation and/or consensus-building process may be appropriate for their circumstances.

## Spectrum Of Consultation And Consensus-Building Approaches


ONE-TIME
SERIES OF MEETINGS
Information Exchange
Consensus-Oriented Dialogue And Negotiation
Public Hearings
Public Meetings
Single Interest Consultations
"Workshops"
"Forums"
"Roundtables"
Informal "Policy Dialogues"
FACA "Policy Dialogue"
Regulatory Negotiation
Foundation...
Standard APA Notice And Comment Procedure With Ad-Hoc, One-On-One Consultation
...Foundation
Relatively Formal
Relatively Informal
Relatively Formal
FACA LINE

# Applying Criteria To Consultation Processes


Spectrum Of Approaches To Consultation
Information Exchange
Public Hearings
Public Meetings
Single Interest Consultations
"Workshops"
"Forums"
Consensus-Oriented Dialogue And Negotiation
"Roundtables"
Informal "Policy Dialogues"
FACA "Policy Dialogue"
Regulatory Negotiation
Standard APA
TENDENCIES
TENDENCIES
TENDENCIES
Criteria
Context
Incentives
Participation
Scope
External Factors
EPA Employee

## II. Parameters of Six Consultation Processes for Implementing the Clean Air Act

The following discussion outlines the parameters of six consultation processes, in addition to the activities conducted under the Administrative Procedures Act. Each of these processes should be viewed as a range of activities, or part of a "spectrum," which may overlap with one another. This "spectrum" of approaches varies according to three general characteristics: 1) the degree to which each process involves interactions between EPA and each interest group separately or several interests groups at the same time; 2) whether the process is a one-time event or a series of discussions and interactions; and 3) the degree to which the objective of the process is to exchange information and perspectives or to develop consensus solutions.

EPA, as with all federal agencies, is subject to and must comply with the requirements of the Administrative Procedures Act (APA) and the Federal Advisory Committee Act (FACA). A brief description of APA activities is presented below for information purposes. Within the spectrum of additional consultation processes, the first approach described is "single interest group consultations," which involves meetings with representatives of a single interest group. On the other extreme of the spectrum, "regulatory negotiations" involve all affected interests in a series of formal negotiation sessions aimed at achieving consensus agreements. The middle range includes one-time or a series of interactions that have the objective of information exchange, fact-finding or consensus-building in relatively less formal settings. When EPA seeks consensual adcvice from select groups of experts, EPA will follow FACA the requirements that the Agency obtain a charter, have balanced membership, and announce and conduct the meetings. Each process has general characteristics, but should not be viewed as completely separate and distinct. Rather, activities could be contemplated that would fall both within and between some of the methods described below.

## Administrative Procedures Act (APA)/Public Hearings

What: Information sharing activities such as publication of significant decisions in the Federal Register and conduct of hearings to obtain public comment prior to specific decision points.

Objective: To provide an opportunity for all affected interests to formally submit comments on proposed rules.

Who: Public at-large and representatives of key interest groups.

When: At specific decision points, as required by APA.

Role of EPA: Rule proponent, decision maker.

Example: Any formal public hearing or public comment period that precedes or follows issuance of a proposed rule.

## Public Meetings

What: Information sharing activities such as meetings conducted prior to public hearings. Also includes contacts with and inquiries from key affected interests, either in small meetings or by telephone.

Objective: To provide an opportunity for all affected interests to ask questions and share concerns. Allows exchange of information with interested and affected parties in less formal, one-on-one settings.

Who: Public at-large and representatives of key interest groups.

When: Usually prior to formal decision points of the regulatory process.

Role of EPA: Rule proponent, decision maker.

Example: Any informal public gathering in which the Agency imparts information and receives comments reflecting a lack of consensus on an upcoming regulatory or policy action. Any telephone or personal consultation with individuals,, or groups not established by the Agency.

## Single Interest Group Consultations

| | |
|---|---|
| What: | One time or a series of meetings, briefings or consultations conducted separately with individual representatives of distinct interest groups. |
| Objective: | To give and receive information with representatives of a single interest group; to exchange views, utilize the expertise of external constituencies, build trust and improve relationships. |
| Who: | Selected individual representatives or self-selected delegations of each major affected interest. |
| When: | At beginning of and throughout the regulatory process, as needed. |
| Role of EPA: | Principal convenor and participant. EPA retains policy/decision making role. |
| Example: | EPA's Petroleum Refinery Cluster information gathering meetings with industry, states, and environmental/citizen/labor groups. |

## Information Exchange "Forums"/"Workshops"

| | |
|---|---|
| What: | One-time events (one to three days in length) involving diverse and balanced representation of all affected interest groups. |
| Objective: | To communicate to interest groups the issues, concerns, and constraints facing the agency in the rulemaking; offer an opportunity for informal input by each individual interest group; allow each individual interest group to hear the perspectives and concerns of other interests; and to allow each individual interest group to hear EPA's responses to inquiries from those present. EPA does not seek to obtain consensus. |
| Who: | All relevant interest groups, designated or self-selected, but limited representatives for each. Balanced representation. |
| When: | Typically, early in the regulatory development process. |
| Role of EPA: | Participant and in some instances principal convenor. EPA retains policy/decision making role. |
| Example: | The Keystone Center's RCRA Reauthorization Forum |

"Roundtables"/Informal "Policy Dialogues"

| | |
|---|---|
| What: | Ongoing, informal information discussions over regulatory policy issues with designated representatives of affected interests. EPA neither seeks nor obtains consensus advice. |
| Objective: | To give each individual interest group the opportunity to gain information, discuss issues, and generate options and alternatives. Other objectives of single interest group consultations and information exchange forums may also apply. |
| Who: | All relevant interest groups, designated or self-selected, but limited representatives for each. Balanced representation. |
| When: | At beginning of and during the regulatory decision making process, as appropriate. |
| EPA Role: | Participant and typically the principal convenor. EPA can observe or participate in policy dialogues that are convened by outside parties. EPA may also use advice and recommendations generated by committees established by outside parties (In such cases, FACA may apply, warranting consultation with the EPA FACA attorney in Office of General Counsel). |
| Example: | Clean Air Act Permits Roundtable, CAA Voluntary Reductions Roundtable. |

FACA "Policy Dialogue"

| | |
|---|---|
| What: | Formal "policy dialogue" that follows the rules of the Federal Advisory Committee Act. EPA's goal on establishing such a committee is to reach consensus. |
| Objective: | In a more formal setting than the above options, obtain advice, sometimes in the form of consensus recommendations, on significant policy issues through a public meeting process that involves representatives of a balanced group of affected interests. Objectives of other processes may apply. |
| Who: | Designated representatives of all relevant interest groups. Representatives may nominate themselves. for each. Balanced representation. |
| When: | At beginning of and at regularly scheduled intervals throughout the regulatory process. |

EPA Role: EPA charters the FACA committee and makes sure all other FACA requirements are met. EPA staff may be a committee member or may participate in discussions at the request of the committee. If a consensus is achieved EPA should give the highest possible consideration to recommendations.

Example: Acid Rain Advisory Committee.

### Regulatory Negotiations

What: Formal negotiations under the Negotiated Rulemaking Act and FACA between designated representatives of affected interests aimed at achieving consensus agreements on proposed rules.

Objective: To negotiate consensus agreements on the content of and/or principles to be reflected in a particular rule. The agency participates as a party to these negotiations and commits to using any consensus recommendations that may be reached as the basis of a proposed rule. Other objectives of other consultation processes also may apply.

Who: All relevant interest groups with designated representatives for each. Balanced representation.

When: At beginning of and at regularly scheduled intervals throughout the regulatory process.

EPA Role: Party to the negotiations. EPA retains ultimate policy/decisionmaking role. As per requirements of the APA, EPA must be responsive to comments received on whatever proposed rule emerges from the "reg neg" process.

Example: Reformulated/Oxygenated Fuels and Fugitive Emissions Regulatory Negotiations.

## III. Assessment Criteria for Selecting Consultation Processes

Selecting the appropriate consultation method is a critical step toward a successful rulemaking effort. The people involved, the broader ramifications of the rule subject matter, the technical and political complexity of the effort, the inherent incentives for participation by all interested parties, as well as timing and resources, all play a key role in choosing the most appropriate consultation method. Below are criteria that managers and work group planners should consider in developing a strategy for carrying out their charge.

Context

- What is the larger context for the rulemaking? For example, what other rules may be under discussion with the interested parties?
- How might these or recently completed rulemaking processes effect the viability of using a consultation process in conjunction with the current rule?
- What other goals is the agency trying to accomplish in the given timeframe? Are the goals consistent with each other? Are the potential outcomes of a consultation process consistent with agency goals?
- Is a consultation process appropriate given the current circumstances (e.g., if parties are likely to litigate regardless of the result of a consultation process for the rulemaking, it may not be in EPA's interest to use a consultation process to achieve its desired outcome).
- Is EPA internally organized such that it will be able to participate and be perceived as a unified team?

Scope of Issues

- What is the scope of issues that could be addressed in a consultation process? Are issues too numerous or too complex to address with multiple parties? If not, how can the number and complexity of issues be most effectively managed?
- Is technical research or information available that can resolve some questions and narrow the scope of issues of concern?
- Do the issues of concern for various parties overlap? Given the scope of issues, what consultation process is appropriate to address them? For example, some parties may be concerned about certain aspects of a rule while other parties have concerns about separate aspects. In this case, single interest group meetings may be an appropriate first step in addressing parties' concerns.

Participation

- Who is potentially affected by the regulation and who has the power to influence or block the implementation of the regulation -- and therefore may be an appropriate candidate for participation in a consultation process?

- For multi-party processes, can representatives or spokespersons of all relevant interest groups be identified?

- Can interest groups agree on individuals that can represent them?

- Is the representation of different interest groups balanced?

- Are the number of people contemplated a reasonable number for the process under consideration?

- Does the Agency know of any interest groups that may not be aware of a particular rulemaking effort or that are aware but do not intend to participate? If so, should their participation be encouraged by the Agency?

Incentives

- What are the agency's incentives for conducting a consultation process (i.e. what might the agency gain)?
- What is the agency's best alternative to using a consultation process to develop legally defensible and implementable rules? Are the alternatives potentially more beneficial or less risky than the proposed process?
- What are the parties' incentives to participate in a cooperative effort with EPA? What incentives or disincentives does EPA create by the choice it makes in suggesting one consultation approach versus another? (i.e. Do incentives for parties to participate vary if EPA is participant rather than an observer? If the meetings are information exchange versus consensus-oriented?)

- What are the parties' underlying interests? Are they likely to be advanced through participation in the process?

- What are the parties' best alternatives to participation? Are alternatives likely to be perceived as more beneficial or less risky than the proposed process?

Timing

- How much time is available to prepare for and conduct a consultation process? Is that time adequate for the type of process contemplated? For example, if the timeline for a rule is constrained, it may not be appropriate to enter into an ongoing consultation process such as a FACA "policy dialogue" or regulatory negotiation.

- Is the timeframe of the consultation process in conflict with other relevant activities of the parties' or the agency? For example, will the demands of other responsibilities afford adequate staff time for the agency to pursue a consultation process?

Resources

- What kind of resources (people, materials, and financial) are necessary to conduct the consultation process? Are adequate resources available to conduct the process?

## IV. Applying Criteria to Consultation Processes

Combined responses to the questions presented above indicate **tendencies** for the most appropriate consultation approach to use for increasing participation in a regulatory effort. This section offers guidance in applying the criteria discussed in Part III to the consultation processes presented in Part II.

The first consideration for the agency is whether to conduct any type of consultation process above the requirements of the Administrative Procedures Act (APA). Agency staff should begin by considering the answers to the contextual and incentive questions posed in Part III. If there appear to be conflicts between rulemaking processes or if parties are likely to litigate regardless, it may be appropriate to delay or avoid meetings, workshops or dialogues. Similarly, if the agency's or parties' incentives to participate appear to be inadequate, the agency may decide not to conduct any type of process beyond APA requirements.

Potential reasons to conduct a consultation process include the following:

- Obtaining information from external interests to improve the content and implementability of a rule or policy;
- Improving relationships with affected interests; and
- Creating new ideas or alternative policy or regulatory structures.

If the agency decides to proceed with a consultation process, several decisions will assist the agency in narrowing the choice of a specific consultation process. These decisions arise out of answering the following five questions:

- Should the agency pursue **information exchange meetings** or **consensus-oriented dialogues** or negotiations?

- Should the agency conduct a **one-time meeting or a series of meetings**?

- Should the agency meet with **one interest group at a time or with all interest groups** simultaneously?

- Is the agency interested in conducting relatively **informal or more formal meetings**?

- If the agency decides to pursue formal meetings, should it conduct a **FACA policy dialogue or regulatory negotiation**?

Before deciding on any type of consultation process, the agency should determine that it has adequate time and resources to conduct the process.

Should the agency pursue **information exchange meetings or consensus-oriented dialogues or negotiations?**

In deciding between information exchange meetings or consensus-oriented meetings, the agency should consider answers to the questions of Scope and Participation presented in Part III.
Information exchange meetings are more suitable if:

- The scope of the issues is ill-defined or too numerous or complex to address in dialogue setting;

- Interested parties are not sufficiently educated on the issues to participate in a decision-oriented process;

- Individuals or groups interested in the issues cannot be easily identified or are poorly organized;

- Interest groups cannot support selection of representatives to participate in a multi-party process.

By conducting information exchange meetings, interest groups may be able to organize themselves and select representatives to later participate in a consensus-oriented process. Similarly, if affected interests are inadequately informed about relevant issues, conducting information exchange processes may prepare them to participate effectively in dialogues or negotiations.

There may be interests who should be aware of and involved in a regulatory or policy decision, but have not been involved to date. In this case, the agency may identify individuals to participate in information exchange meetings in order to bring them up to speed for effective involvement.

In order to conduct consensus-oriented dialogues or negotiations, representatives of affected interests must be identifiable. Parties must be able to support the selection of representatives to speak for them during discussions. Issues must be somewhat focused and discreet in order to effectively discuss them (though policy dialogues often address broad sets of issues). Parties should be relatively knowledgeable about the issues before convening them for consensus-oriented discussions.

In many cases, information exchange meetings will meet the goals of the agency. Instances in which the agency may want to consider consensus-oriented processes include situations where:

- Parties seek a consensus effort and are willing to commit the time and resources necessary to participate;
- Agency is willing to allow consensus decisions to guide a policy or regulatory decision;
- Agency desires an outcome supported by all affected interests;
- Agency seeks a policy or regulatory outcome that is more easily implemented (i.e. reduced administrative and legal challenges);
- Agency needs to address competing points of view earlier rather than later in the process; or
- Agency perceives that the incentives, timing, and available resources are in place so that the process is likely to succeed.

### Should the agency conduct a one-time meeting or a series of meetings?

Due to the nature of consensus-oriented meetings, these processes usually involve more than one meeting and are often subject to FACA. In the case of an information exchange consultation process, the agency may conduct a one-time meeting or a series of meetings. Primarily, this decision is determined by whether a one time meeting can provide sufficient technical and political information to complete the regulatory or policy task. If one meeting suffices, the choice is obvious. If affected interests may view one meeting as inadequate to communicate their concerns, more than one meeting should be considered.

For more than one meeting, time constraints and availability of resources will affect the number of meetings conducted. The agency should clearly identify the scope of issues, resources available, and the goal of conducting meetings in order to determine in advance the number and timing of meetings. The agency should indicate its intentions for the number of meetings from the outset. This indication sets reasonable expectations and allows affected interests to plan their participation.

Should the agency meet with one interest group at a time or with all interest groups simultaneously?

All consensus-oriented meetings, by definition, involve more than one interest group. If the agency proceeds with an information exchange consultation process, it may meet with interest groups together or separately. If parties are interested in meeting together, it may be prudent and responsive to conduct public hearings, public meetings, workshops or roundtables. The agency should meet with parties simultaneously only if they are willing to share their views in each other's presence. The agency may want to have parties meet together if it wishes for parties to hear each other's views. If the nature of parties' concerns overlap, it also may be more efficient to have parties meet together so that similar concerns can be addressed at once.

Is the agency interested in conducting relatively informal or more formal meetings?

For information exchange processes, public hearings and meetings are considered more formal processes, whereas workshops, forums, and "roundtables" are less formal in nature. If the agency wishes to create an opportunity for a formal public testimony record, it should conduct a public hearing. A public meeting offers more opportunity for a two-way exchange of information than a hearing. Workshops, forums, and "roundtables" are sometimes off the record (though the press may be in attendance) and more discussion--rather than question/answer--oriented than public meetings.

For a processes that aim at generating a consensus agreement, the agency must establish a FACA "policy dialogue" NOTE: Not all FACA efforts need be consensus-oriented.) If the meetings, issues and proposed participants meet FACA triggers, a FACA process must be pursued. If the agency seeks a high degree of formality in order to legitimize their decision making process, a FACA "policy dialogue" or regulatory negotiation may be appropriate. If the agency seeks to involve participants of high stature in the process, the formality of a FACA "policy dialogue" or regulatory negotiation may be appropriate.

If the agency decides to pursue formal meetings, should it conduct a FACA policy dialogue or regulatory negotiation?

If the agency seeks the involvement of a consistent group of people in a formal setting, it must decide whether a "policy dialogue" or regulatory negotiation is more appropriate. The distinction here is relatively simple. If the scope of issues suggests broader policy issues, a policy dialogue is appropriate. Consensus agreements for a specific rulemaking are sought through the regulatory negotiation process.

The tendencies toward use of particular consultation processes presented here are a sample of how the criteria (Part III) can be applied to the consultation processes (Part II). Each situation should be carefully evaluated using each of the criteria before deciding on a specific approach.

## V. Key Factors in Initiating Consultation Processes

Using the criteria and tendencies described in Parts III and IV above, the agency staff should begin its particular Clean Air Act implementation task by assessing the regulatory situation and making some preliminary judgements about what, if any, consultation process may be appropriate. The Agency staff should consider the following checklist of internal and external factors as they proceed.

Internal

___ Does the Agency have adequate time and resources to conduct the consultation process under consideration?

___ Does the Agency have adequate incentive to conduct the consultation process?

___ Has the Agency decided its role in the process and remained cognizant of the affect of its role on the interest group's incentives to participate?

___ Has an appropriate scope of issues been identified?

___ Are other processes being conducted on related issues (either within the office or in other offices)?

___ Will other processes affect or be affected by the consultation process? Will any related efforts be coordinated with the proposed process?

___ Have the appropriate roles within EPA been defined for the effort? Has headquarters been consulted sufficiently early about the selected consultation process and the design of it? Is the proposed EPA team effective? Has an appropriate individual been identified to lead the effort?

___ Are appropriate on-going channels of communication with headquarters in place?

### External

___ Does the Agency have an overall strategy or plan for consulting with outside groups on the particular issues of concern?

___ Does the Agency know one or two key representatives in each interest group in order to conduct an initial assessment?

___ Have the Agency's expectations of the outside interests been defined and communicated to the interests?

___ Does the Agency know the major concerns or interests of each interest group?

___ Does the Agency know the current activities of affected interest groups?

___ Is the Agency aware of the key interest group's alternative means of effecting the regulatory process?

___ Does the Agency have reliable information and feedback from affected interests as to the viability of the selected approach?

___ Is the Agency likely to have the participation of the key interest groups in a consultation process?

___ Does the Agency have an understanding for the needs and concerns of agencies and government officials outside EPA (e.g. White House, states, congressional members)?

___ Does the Agency have a plan for coordinating the input of these outside non-government offices?

In conducting the assessment or as part of conducting a consultation process, the Agency may want to use the services of a third party neutral. Possible roles for third parties may include:

- providing EPA staff with feedback on their preliminary judgements about what consultation strategy to pursue;
- exploring and obtaining feedback from affected interests on EPA's ideas about strategies to pursue;
- if necessary, conducting a formal "convening assessment;" and
- facilitating discussions/negotiations with key interest groups.

Within the Office of Policy, Planning and Evaluation (OPPE), there exists the Regulatory Negotiation Project. The staff affiliated with this project can be of assistance to Agency staff as they pursue not only regulatory negotiations, but all consultation and consensus-building options discussed in this paper. The Agency's Office of Policy, Planning and Evaluation staff, EPA,s Committee Management Officer, and the Office of General Counsel FACA attorney can be of particular assistance in answering questions related to FACA and the use of outside third party facilitators.

# CHAPTER 3 - THE STATUTORY BASIS FOR NEGOTIATED RULEMAKING

In passing the Negotiated Rulemaking Act of 1990 (Public Law No. 101-648, codified at 5 U.S.C. §§561-570), Congress recognized and endorsed the authority of federal agencies to use negotiated rulemaking procedures. The Act created a statutory framework that nevertheless allows for substantial flexibility in using reg-neg and encourages "innovation and experimentation with the negotiated rulemaking process or with other innovative rulemaking procedures otherwise authorized by law." (5 U.S.C. §561) The Act is reprinted in the appendix.

Because the 1990 Act contains a "sunset" provision (§5) repealing the Act in November 1996, it is important to note that renewal of the Act is not a prerequisite to continued use of reg-neg. In listing its legislative "findings" (§2), Congress noted that "[a]gencies have the authority to establish negotiated rulemaking committees under the laws establishing such agencies and their activities and under the Federal Advisory Committee Act." Thus the Act was not intended to create new authority, but rather to provide some basic groundrules and safeguards.

## Negotiated Rulemaking as a Supplement to APA Procedures

The Administrative Procedure Act (APA), enacted in 1946, imposes upon federal agencies certain procedural requirements for two modes of agency decisionmaking: rulemaking and adjudication. (See 5 U.S.C. §§551-559.) "Rulemaking" is agency action that regulates the future conduct of persons, through formulation and issuance of an agency statement (a "rule" or "regulation") designed to implement, interpret, or prescribe law or policy. It is essentially legislative in nature because of its future general applicability and its concern for policy considerations. By contrast, "adjudication" is concerned with the determination of past and present rights and liabilities, resulting in the issuance of an "order." (See 5 U.S.C. §551.)

Beyond the distinction between rulemaking and adjudication, the APA subdivides each of these categories of agency action into "formal" and "informal" proceedings. Whether a particular rulemaking or adjudication is considered to be formal depends on whether the proceeding is required by statute to be "on the record after opportunity for an agency hearing" (5 U.S.C. §§553(c), 554(a)). The Act prescribes elaborate procedures for both formal rulemaking and formal adjudication, and relatively minimal procedures for informal rulemaking. This *Sourcebook* is concerned only with negotiation of rules in the context of **informal rulemaking**, which is the prevalent form.

Section 553 (see appendix) sets forth the basic requirements for virtually all rulemaking: notice of proposed rulemaking in the Federal Register, followed by an opportunity for some level of participation by interested persons, and finally publication of the rule, in most instances at least thirty days before it becomes effective. Excluded from coverage by the APA are rulemaking involving military or foreign affairs functions and matters relating to agency management or personnel, public property, loans, grants, benefits, or contracts. These exclusions are not mandatory or intended to discourage agencies from using public participation procedures. For a detailed discussion of rulemaking procedures, see *A Guide to Federal Agency Rulemaking*, published by the Administrative Conference (2d ed. 1991).

In informal rulemaking, the only public participation that is required by the APA is an opportunity to submit written data, views, or arguments; oral presentations may also be permitted. The published rule must incorporate a concise general statement of its basis and purpose. However, with the great increase in the complexity of government regulation that has occurred since the APA was enacted, the rulemaking process itself has become more complex.

In many instances, Congress has added, through other statutes, procedural requirements that affect various agency programs. (At the time of publication in mid-1995, Congress was considering substantial revisions to the analyses and other steps that may be required in promulgating regulations.) In general, such additional requirements have been intended to improve the way in which agencies obtain and use information needed for the drafting of rules, and to increase the value and effectiveness of participation in rulemaking by those persons who are likely to be affected by the resulting rules. Although these procedures may provide safeguards against arbitrary or capricious decisions by agencies and help ensure that agencies develop sound factual bases for exercising their discretion, the increased formalization of the "informal" rulemaking process has also had adverse consequences. The various affected interests, including the agency, tend to develop adversarial relationships with each other causing them to take extreme positions, to withhold information from one another, and to attack the legitimacy of opposing positions. Participants in rulemaking rarely meet with each other and with the agency as a group to communicate their respective views, so that each can react directly to the concerns and positions of others in an effort to resolve conflicts.

This is the context in which the concept of negotiated rulemaking has emerged. Negotiated rulemaking is a *supplement* to the rulemaking procedures prescribed by the Administrative Procedure Act. As such, it is consistent with that Act. The essential function of a negotiating committee in rulemaking is to try to reach a consensus on a proposed rule. At that point, the agency considers whether to issue a notice of proposed rulemaking and the APA's provisions for public comment apply.

So long as the agency complies with the APA's basic notice and comment requirements and the agency retains discretion to determine the content of the final rule, there should be no conflict with the requirements of the APA. While agencies have been willing to commit themselves at the outset to publishing a proposed rule that incorporates the results of the negotiations, they routinely remind the negotiators that the statutory requirements are applicable even to a negotiated agreement. Some examples of language used by agencies are:

> - [The Federal Railroad Administration] would issue the proposed rule as prepared by the Committee unless it is inconsistent with statutory authority of the agency or other legal requirements or does not, in the agency's view, adequately address the subject matter. If that occurs, FRA would explain the reasons for its decision, or would modify the proposal in a way that allows the public to distinguish modifications from the original proposal. (59 Fed. Reg. 42203, Aug. 17, 1994)
>
> - The agency intends to use any consensus that is justified and within its statutory authority as the basis of the proposal. (EPA, 51 Fed. Reg. 25401, July 14, 1986)

> - OSHA, to the maximum extent possible consistent with the legal obligations of the Agency, will use the consensus of the Committee as the basis for the rule proposed by the Agency for public notice and comment. . . . The Agency . . . is committed to publishing a consensus proposal that is consistent with OSHA's legal mandates. (59 Fed. Reg. 25850, May 18, 1994)

Some agencies using reg-neg, such as EPA, ordinarily terminate their negotiating committees when a report is received, either proposing a rule on the basis of a consensus, reporting a partial consensus, or reporting an inability to reach consensus. The Department of Transportation has found it advantageous to keep the committee in existence long enough to be able to consult with the committee after receipt of public comments on the proposed rule. The Reg-Neg Act permits either practice. (5 U.S.C. §567)

Any such agency consultations with a negotiating committee or its members should be carried out in public so as to minimize objections on the grounds of improper *ex parte* contacts. This term refers to oral or written communications not on the public record for which interested parties have not received reasonable notice (5 U.S.C. §551). To avoid the problem, consultations can take place at open committee meetings, with advance notice published in the Federal Register. The agency should put into the rulemaking record the content of all discussions with the negotiating committee held after the public comment period. (See Administrative Conference Recommendation 77-3, 1 CFR §305.77-3, in the appendix.)

## The Federal Advisory Committee Act

The Federal Advisory Committee Act (FACA), Public Law No. 92-463, 5 U.S.C. App., was enacted by Congress in 1972 to provide uniform standards for the operation of advisory committees within the executive branch, to monitor the number of committees and their activity, and to assure that the public would have access to their deliberations. (See appendix for the text of FACA.) "Advisory committee" is defined by section 3 of the Act to include any committee or similar group that is (1) established or utilized in the interest of obtaining advice or recommendations for the President or one or more federal agencies and (2) not composed wholly of full-time federal officers or employees. The Reg-Neg Act makes clear that, in general, negotiated rulemaking committees are required to be established and operated in accordance with the requirements of FACA, except as modified by the Reg-Neg Act. (See 5 U.S.C. §565(a)(1)) Typically, agency notices of intent to form an advisory committee include a statement to that effect:

> Negotiations are conducted through advisory committees chartered under the Federal Advisory Committee Act. All procedural requirements of the Administrative Procedure Act and other applicable statutes continue to apply. (EPA, 51 Fed. Reg. 25401, July 14, 1986)

In a few instances in which Congress has required an agency to use reg-neg, the legislation has specifically exempted the committee from complying with FACA. (See, e.g., Higher Education Amendments of 1992, Public Law No. 102-325, §497) An exclusion from FACA may also exist in the special situation where all members of the committee are representatives of state, local, Indian tribal, and federal government entities. (See Unfunded Mandates Reform Act of 1995, Public Law No. 104-4, §204)

Among the requirements of FACA are that new advisory committees be established only after public notice and upon a determination that establishment is in the public interest (§9), that the membership of each advisory committee be fairly balanced in terms of the points of view represented (§5), and that meetings of advisory committees be open to the public, subject to the same exemptions as in the Government in the Sunshine Act (5 U.S.C. §552b).

The requirements of FACA that are modified by the Reg-Neg Act relate to who chairs the meetings (5 U.S.C. §566), the extent to which committee members' expenses may be paid (§568), and provisions for terminating the committee (§567). Also, the Reg-Neg Act requires an additional public notice, announcing the agency's intent to establish a reg-neg committee and inviting persons who believe their interests are not adequately represented to apply for membership on the committee. (See 5 U.S.C. §564)

The guidance and coordination of advisory committees, assigned by section 7 of the Act to the Office of Management and Budget (OMB), has been transferred under Executive Order 12024 (Dec. 1, 1977) to the Administrator of the General Services Administration (GSA). An important step in setting up an advisory committee (§9) is submission by the agency of the committee's charter to GSA for review. GSA, in turn, refers rulemaking negotiation committee charters to OMB for further review.

The time consumed by the chartering process has long been criticized as a source of unnecessary delay. Furthermore, several administrations have tried to limit, in general, the number of advisory committees. For example, Executive Order 12838 required a finding of compelling reasons by the agency head and the approval of the Director of the Office of Management and Budget before an agency could create any new advisory committee.

Because review and approval procedures for committees change from time to time, current information should be obtained by agencies proposing reg-neg committees. Good sources of assistance are the agency's own advisory committee management officer, the Committee Management Secretariat at GSA, and the Office of Information and Regulatory Affairs at OMB.

GSA, in 1987, adopted a final rule governing advisory committees (41 CFR Part 101-6, 52 Fed. Reg. 45926, Dec. 2, 1987), replacing the interim rule that had been effect since 1983. (See appendix for the text of the GSA rule.) The final rule contains language that helps resolve a major concern that has been raised about the effect of FACA on negotiated rulemaking committees. Many experienced negotiators and mediators maintain that successful negotiations often depend on sensitive discussions among various groups of negotiators. To require that all such discussions be deemed "meetings" under FACA and therefore be open to public scrutiny would, they say, doom reg-neg to failure. Privacy may also be necessary when parties with allied concerns want to caucus in order to discuss common negotiating positions on issues. The GSA rule lists a number of examples of advisory meetings or groups that GSA would exclude from coverage of the Act, including:

> Meetings of two or more advisory committee or subcommittee members convened solely to gather information or conduct research for a chartered advisory committee, to analyze relevant issues and facts, or to draft proposed position papers for deliberation by the advisory committee or a subcommittee of the advisory committee. 41 CFR §101-6.1004 (k)

The Administrative Conference has suggested the usefulness of statutory language that would explicitly authorize private meetings of subgroups or caucuses of a negotiated rulemaking committee for the purpose of determining negotiating positions, alternative proposals, or other matters for consideration by the full committee in open session. Nevertheless, in practice, the existing provisions of FACA appear not to pose any serious obstacle to successful reg-neg. In 1985, the Conference reexamined its 1982 recommendation on negotiated rulemaking, and modified and supplemented its advice in the light of agencies' actual experience. At that time, the Conference again considered the question of whether FACA needed to be amended, and wrote as follows:

> Some agencies have indicated a concern about the effect of the Federal Advisory Committee Act on negotiated rulemaking proceedings. The four agency experiences reviewed by the Administrative Conference have not shown that the Act, as interpreted by the sponsoring agencies and participants, impeded effective negotiations. Under current judicial and agency interpretations of the Act, it appears that caucuses and other working group meetings may be held in private, where this is necessary to promote an effective exchange of views. (1 CFR §305.85-5 -- see appendix to chapter 1)

The determinative issue appears to be the extent to which decisions are actually made in the subgroup. Clearly it is the intent of FACA to make public those deliberations where the actual formulation of the advice takes place. If the real negotiations are in a subgroup or working group, and the full committee is a merely a rubber stamp, then the subgroup should be subject to the openness requirements of the Act. If all of the committee members who care strongly about a particular issue participate in the subgroup that addresses that issue, then it is likely that this is where the real decisions are being made.

If, on the other hand, the working group meetings are largely drafting sessions, or are exploratory discussion sessions for the purpose of identifying issues and alternative solutions for consideration by the full committee, then this suggests that the subgroups are not performing the essential function of advisory committees as envisioned in the Act, and only the full committee should be subject to the openness requirement.

Even if negotiations occur in subgroup meetings, and the subgroup proposes negotiated solutions on certain issues to the full committee, the full committee may insist on engaging in a total review *de novo*. In this instance, it is arguable that the source of the advice offered to the agency by the negotiating committee is actually the full committee and not the subgroup, and therefore the subgroup should not be subjected to FACA's openness requirements. Some support for this argument may be found in

*National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control*, 711 F.2d 1071 (D.C. Cir. 1983).

Section 9(a)(2) of FACA requires a Federal Register notice for establishment of an advisory committee. Other chartering requirements are in section 9(c). Because negotiating committees are usually chartered in conjunction with the convening process, sample documents that an agency normally would have to draft in establishing a committee appear in the *Sourcebook* in the appendix to chapter 4.

Section 10(e) of FACA requires designation of a federal officer or employee to chair or attend each advisory committee meeting. (See also §10(f).) This requirement is normally satisfied by the presence of the agency's negotiating representative. That person, however, would not chair the negotiating sessions -- a role ordinarily handled by a mediator or facilitator. (See 5 U.S.C. §566(d))

Section 7(d) of FACA provides authority, where appropriate, for payment of travel expenses and compensation for members of advisory committees. Section 12(b) provides that each agency shall be responsible for providing support services for committees that it may establish.

When the Federal Trade Commission conducted its first negotiated rulemaking, the negotiating committee was the agency's first advisory committee created under FACA. The Commission therefore had to adopt a regulation governing management of advisory committees. An agency that has not previously used advisory committees, which is considering the formation of a reg-neg committee, may find it useful to refer to the FTC's Federal Register notice adopting a rule on advisory committee management. (51 Fed. Reg. 30055 (Aug. 22, 1986); 16 CFR Part 16)

## Other Statutory Requirements, Executive Orders, etc.

Adoption of agency regulations may be subject to additional statutory constraints and the special requirements of the Paperwork Reduction Act (44 U.S.C. §§3501-3520), the Regulatory Flexibility Act (5 U.S.C. §§601-612), and applicable executive orders affecting regulatory planning and review (e.g., Executive Order 12866). For a detailed discussion of these matters, see *Federal Administrative Procedure Sourcebook* (2d ed. 1992) and *A Guide to Federal*

*Agency Rulemaking* (2d ed. 1991), both published by the Administrative Conference.

## Appendix

The appendix contains the text of the Negotiated Rulemaking Act of 1990 and an excerpt from the Administrative Conference's *Federal Administrative Procedure Sourcebook* (chapter 14, 2d ed. 1992) summarizing the Act and its legislative history. Also reprinted is a supporting statement of Senator Carl Levin, the sponsor of the Senate bill that became the Negotiated Rulemaking Act.

Section 553 of the Administrative Procedure Act sets forth the basic statutory requirements for rulemaking. Administrative Conference Recommendation 77-3 addresses *ex parte* concerns. The Federal Advisory Committee Act and GSA's committee management rule contain requirements and provide guidelines for establishment and operation of advisory committees.

## Negotiated Rulemaking Act

### (Public Law 101-648, as amended by Public Law 102-354)

### Title 5, U.S. Code

### Subchapter III – Negotiated Rulemaking Procedure

§561. Purpose.

§562. Definitions.

§563. Determination of need for negotiated rulemaking committee.

§564. Publication of notice; applications for membership on committees.

§565. Establishment of committee.

§566. Conduct of committee activity.

§567. Termination of committee.

§568. Services, facilities, and payment of committee member expenses.

§569. Role of the Administrative Conference of the United States and other entities.

§570. Judicial review.

## Subchapter III – Negotiated Rulemaking Procedure[1]

### REPEAL OF SUBCHAPTER

Subchapter repealed effective six years after Nov. 29, 1990; see section 5 of Pub. L. No. 101-648, as amended, set out as an Effective Date of Repeal; Savings Provision note under section 561 of this subchapter.

### §561. Purpose

The purpose of this subchapter is to establish a framework for the conduct of negotiated rulemaking, consistent with section 553 of this title, to encourage agencies to use the process when it enhances the informal rulemaking process. Nothing in this subchapter should be construed as an attempt to limit innovation and experimentation with the negotiated rulemaking process or with other innovative rulemaking procedures otherwise authorized by law.

(Added Pub. L. No. 101-648, §3(a), Nov. 29, 1990, 104 Stat. 4970.)

### EFFECTIVE DATE OF REPEAL; SAVINGS PROVISION

Section 5 of Pub. L. No. 101-648, as amended by Pub. L. No. 102-354, provided that: "Subchapter III of chapter 5 of title 5, United States Code (enacted as subchapter IV of chapter 5 of title 5, United States Code, by section 3 of this Act and redesignated as subchapter III of such chapter 5 by section (3)(a) of [Public L. No. 102-354]) and that portion of the table of sections at the beginning of chapter 5 of title 5, United States Code, relating to subchapter III, are repealed, effective 6 years after the date of the enactment of this Act [Nov. 29, 1990], except that the provisions of such subchapter shall continue to apply after the date of the repeal with respect to then pending negotiated rulemaking proceedings initiated before the date of repeal which, in the judgment of the agencies which are convening or have convened such proceedings, require such continuation, until such negotiated rulemaking proceedings terminate pursuant to such subchapter."

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[1] Public Law 102-354 renumbered the sections of the Negotiated Rulemaking Act.

### CONGRESSIONAL FINDINGS

Section 2 of Pub. L. No. 101-648 provided that: "The Congress makes the following findings:

"(1) Government regulation has increased substantially since the enactment of the Administrative Procedure Act.

"(2) Agencies currently use rulemaking procedures that may discourage the affected parties from meeting and communicating with each other, and may cause parties with different interests to assume conflicting and antagonistic positions and to engage in expensive and time-consuming litigation over agency rules.

"(3) Adversarial rulemaking deprives the affected parties and the public of the benefits of face-to-face negotiations and cooperation in developing and reaching agreement on a rule. It also deprives them of the benefits of shared information, knowledge, expertise, and technical abilities possessed by the affected parties.

"(4) Negotiated rulemaking, in which the parties who will be significantly affected by a rule participate in the development of the rule, can provide significant advantages over adversarial rulemaking.

"(5) Negotiated rulemaking can increase the acceptability and improve the substance of rules, making it less likely that the affected parties will resist enforcement or challenge such rules in court. It may also shorten the amount of time needed to issue final rules.

"(6) Agencies have the authority to establish negotiated rulemaking committees under the laws establishing such agencies and their activities and under the Federal Advisory Committee Act (5 U.S.C. App.). Several agencies have successfully used negotiated rulemaking. The process has not been widely used by other agencies, however, in part because such agencies are unfamiliar with the process or uncertain as to the authority for such rulemaking."

### AUTHORIZATION OF APPROPRIATIONS

Section 4 of Pub. L. No. 101-648 provided that: "In order to carry out this Act and the amendments made by this Act, there are authorized to be appropriated to the Administrative Conference of the United States, in addition to amounts authorized by section 596 of title 5, United States Code, not in excess of $500,000 for each of the fiscal years 1991, 1992, and 1993."

## §562. Definitions

For the purposes of this subchapter, the term--

(1) "agency" has the same meaning as in section 551(1) of this title;

(2) "consensus" means unanimous concurrence among the interests represented on a negotiated rulemaking committee established under this subchapter, unless such committee

(A) agrees to define such term to mean a general but not unanimous concurrence; or

(B) agrees upon another specified definition;

(3) "convener" means a person who impartially assists an agency in determining whether establishment of a negotiated rulemaking committee is feasible and appropriate in a particular rulemaking;

(4) "facilitator" means a person who impartially aids in the discussions and negotiations among the members of a negotiated rulemaking committee to develop a proposed rule;

(5) "interest" means, with respect to an issue or matter, multiple parties which have a similar point of view or which are likely to be affected in a similar manner;

(6) "negotiated rulemaking" means rulemaking through the use of a negotiated rulemaking committee;

(7) "negotiated rulemaking committee" or "committee" means an advisory committee established by an agency in accordance with this subchapter and the Federal Advisory Committee Act to consider and discuss issues for the purpose of reaching a consensus in the development of a proposed rule;

(8) "party" has the same meaning as in section 551(3) of this title;

(9) "person" has the same meaning as in section 551(2) of this title;

(10) "rule" has the same meaning as in section 551(4) of this title; and

(11) "rulemaking" means "rule making" as that term is defined in section 551(5) of this title.

(Added Pub. L. No. 101-648, §3(a), Nov. 29, 1990, 104 Stat. 4970.)

### §563. Determination of need for negotiated rulemaking committee

**(a) Determination of Need by the Agency.** An agency may establish a negotiated rulemaking committee to negotiate and develop a proposed rule, if the head of the agency determines that the use of the negotiated rulemaking procedure is in the public interest. In making such a determination, the head of the agency shall consider whether

(1) there is a need for a rule;

(2) there are a limited number of identifiable interests that will be significantly affected by the rule;

(3) there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who

(A) can adequately represent the interests identified under paragraph (2); and

(B) are willing to negotiate in good faith to reach a consensus on the proposed rule;

(4) there is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time;

(5) the negotiated rulemaking procedure will not unreasonably delay the notice of proposed rulemaking and the issuance of the final rule;

(6) the agency has adequate resources and is willing to commit such resources, including technical assistance, to the committee; and

(7) the agency, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee with respect to the proposed rule as the basis for the rule proposed by the agency for notice and comment.

**(b) Use of Conveners.**

(1) Purposes of conveners. An agency may use the services of a convener to assist the agency in

(A) identifying persons who will be significantly affected by a proposed rule, including residents of rural areas; and

(B) conducting discussions with such persons to identify the issues of concern to such persons, and to ascertain whether the establishment of a negotiated rulemaking committee is feasible and appropriate in the particular rulemaking.

(2) Duties of conveners. The convener shall report findings and may make recommendations to the agency. Upon request of the agency, the convener shall ascertain the names of persons who are willing and qualified to represent interests that will be significantly affected by the proposed rule, including residents of rural areas. The report and any recommendations of the convener shall be made available to the public upon request.

(Added Pub. L. No. 101-648, §3(a), Nov. 29, 1990, 104 Stat. 4970.)

### §564. Publication of notice; applications for membership on committees

**(a) Publication of Notice.** If, after considering the report of a convener or conducting its own assessment, an agency decides to establish a negotiated rulemaking committee, the agency shall publish in the Federal Register and, as appropriate, in trade or other specialized publications, a notice which shall include

(1) an announcement that the agency intends to establish a negotiated rulemaking committee to negotiate and develop a proposed rule;

(2) a description of the subject and scope of the rule to be developed, and the issues to be considered;

(3) a list of the interests which are likely to be significantly affected by the rule;

(4) a list of the persons proposed to represent such interests and the person or persons proposed to represent the agency;

(5) a proposed agenda and schedule for completing the work of the committee, including a target date for publication by the agency of a proposed rule for notice and comment;

(6) a description of administrative support for the committee to be provided by the agency, including technical assistance;

(7) a solicitation for comments on the proposal to establish the committee, and the proposed membership of the negotiated rulemaking committee; and

(8) an explanation of how a person may apply or nominate another person for membership on the committee, as provided under subsection (b).

**(b) Applications for Membership or[2] Committee.** Persons who will be significantly affected by a proposed rule and who believe that their interests will not be adequately represented by any person specified in a notice under subsection (a)(4) may apply for, or nominate another person for, membership on the negotiated rulemaking committee to represent such interests with respect to the proposed rule. Each application or nomination shall include

(1) the name of the applicant or nominee and a description of the interests such person shall represent;

(2) evidence that the applicant or nominee is authorized to represent parties related to the interests the person proposes to represent;

(3) a written commitment that the applicant or nominee shall actively participate in good faith in the development of the rule under consideration; and

(4) the reasons that the persons specified in the notice under subsection (a)(4) do not adequately represent the interests of the person submitting the application or nomination.

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[2] So in original. Probably should be "on".

**(c) Period for Submission of Comments and Applications.** The agency shall provide for a period of at least 30 calendar days for the submission of comments and applications under this section.

(Added Pub. L. No. 101-648, §3(a), Nov. 29, 1990, 104 Stat. 4971.)

### §565. Establishment of committee

**(a) Establishment.**

(1) Determination to establish committee. If after considering comments and applications submitted under section 564, the agency determines that a negotiated rulemaking committee can adequately represent the interests that will be significantly affected by a proposed rule and that it is feasible and appropriate in the particular rulemaking, the agency may establish a negotiated rulemaking committee. In establishing and administering such a committee, the agency shall comply with the Federal Advisory Committee Act with respect to such committee, except as otherwise provided in this subchapter.

(2) Determination not to establish committee. If after considering such comments and applications, the agency decides not to establish a negotiated rulemaking committee, the agency shall promptly publish notice of such decision and the reasons therefor in the Federal Register and, as appropriate, in trade or other specialized publications, a copy of which shall be sent to any person who applied for, or nominated another person for membership on the negotiating[3] rulemaking committee to represent such interests with respect to the proposed rule.

**(b) Membership.** The agency shall limit membership on a negotiated rulemaking committee to 25 members, unless the agency head determines that a greater number of members is necessary for the functioning of the committee or to achieve balanced membership. Each committee shall include at least one person representing the agency.

**(c) Administrative Support.** The agency shall provide appropriate administrative support to the negotiated rulemaking committee, including technical assistance.

(Added Pub. L. No. 101-648, §3(a), Nov. 29, 1990, 104 Stat. 4972.)

### §566. Conduct of committee activity

**(a) Duties of Committee.** Each negotiated rulemaking committee established under this subchapter shall consider the matter proposed by the agency for consideration and shall attempt to reach a consensus concerning a proposed rule with respect to such matter and any other matter the committee determines is relevant to the proposed rule.

**(b) Representatives of Agency on Committee.** The person or persons representing the agency on a negotiated rulemaking committee shall participate in the deliberations and activities of the committee with the same rights and responsibilities as other members of the committee, and shall be authorized to fully represent the agency in the discussions and negotiations of the committee.

**(c) Selecting Facilitator.** Notwithstanding section 10(e) of the Federal Advisory Committee Act, an agency may nominate either a person from the Federal Government or a person from outside the Federal Government to serve as a facilitator for the negotiations of the committee, subject to the approval of the committee by consensus. If the committee does not approve the nominee of the agency for facilitator, the agency shall submit a substitute nomination. If a committee does not approve any nominee of the agency for facilitator, the committee shall select by consensus a person to serve as facilitator. A person designated to represent the agency in substantive issues may not serve as facilitator or otherwise chair the committee.

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[3] So in original. Probably should be "negotiated".

**(d) Duties of Facilitator.** A facilitator approved or selected by a negotiated rulemaking committee shall

(1) chair the meetings of the committee in an impartial manner;

(2) impartially assist the members of the committee in conducting discussions and negotiations; and

(3) manage the keeping of minutes and records as required under section 10(b) and (c) of the Federal Advisory Committee Act, except that any personal notes and materials of the facilitator or of the members of a committee shall not be subject to section 552 of this title.

**(e) Committee Procedures.** A negotiated rulemaking committee established under this subchapter may adopt procedures for the operation of the committee. No provision of section 553 of this title shall apply to the procedures of a negotiated rulemaking committee.

**(f) Report of Committee.** If a committee reaches a consensus on a proposed rule, at the conclusion of negotiations the committee shall transmit to the agency that established the committee a report containing the proposed rule. If the committee does not reach a consensus on a proposed rule, the committee may transmit to the agency a report specifying any areas in which the committee reached a consensus. The committee may include in a report any other information, recommendations, or materials that the committee considers appropriate. Any committee member may include as an addendum to the report additional information, recommendations, or materials.

**(g) Records of Committee.** In addition to the report required by subsection (f), a committee shall submit to the agency the records required under section 10(b) and (c) of the Federal Advisory Committee Act.

(Added Pub. L. No. 101-648, §3(a), Nov. 29, 1990, 104 Stat. 4973.)

### §567. Termination of committee

A negotiated rulemaking committee shall terminate upon promulgation of the final rule under consideration, unless the committee's charter contains an earlier termination date or the agency, after consulting the committee, or the committee itself specifies an earlier termination date.

(Added Pub. L. No. 101-648, §3(a), Nov. 29, 1990, 104 Stat. 4974.)

### §568. Services, facilities, and payment of committee member expenses

**(a) Services of Conveners and Facilitators.**

(1) In general. An agency may employ or enter into contracts for the services of an individual or organization to serve as a convener or facilitator for a negotiated rulemaking committee under this subchapter, or may use the services of a Government employee to act as a convener or a facilitator for such a committee.

(2) Determination of conflicting interests. An agency shall determine whether a person under consideration to serve as convener or facilitator of a committee under paragraph (1) has any financial or other interest that would preclude such person from serving in an impartial and independent manner.

**(b) Services and Facilities of Other Entities.** For purposes of this subchapter, an agency may use the services and facilities of other Federal agencies and public and private agencies and instrumentalities with the consent of such agencies and instrumentalities, and with or without reimbursement to such agencies and instrumentalities, and may accept voluntary and uncompensated services without regard to the provisions of section 1342 of title 31. The Federal Mediation and Conciliation Service may provide services and facilities, with or without reimbursement, to assist agencies under this subchapter, including furnishing conveners, facilitators, and training in negotiated rulemaking.

**(c) Expenses of Committee Members.** Members of a negotiated rulemaking committee shall be responsible for their own expenses of participation in such committee, except that an agency may, in accordance with section 7(d) of the Federal Advisory Committee Act, pay for a member's reasonable travel and per diem expenses, expenses to obtain technical assistance, and a reasonable rate of compensation, if

(1) such member certifies a lack of adequate financial resources to participate in the committee; and

(2) the agency determines that such member's participation in the committee is necessary to assure an adequate representation of the member's interest.

**(d) Status of Member as Federal Employee.** A member's receipt of funds under this section or section 569 shall not conclusively determine for purposes of sections 202 through 209 of title 18 whether that member is an employee of the United States Government.

(Added Pub. L. No. 101-648, §3(a), Nov. 29, 1990, 104 Stat. 4974.)

### §569. Role of the Administrative Conference of the United States and other entities

**(a) Consultation by Agencies.** An agency may consult with the Administrative Conference of the United States or other public or private individuals or organizations for information and assistance in forming a negotiated rulemaking committee and conducting negotiations on a proposed rule.

**(b) Roster of Potential Conveners and Facilitators.** The Administrative Conference of the United States, in consultation with the Federal Mediation and Conciliation Service, shall maintain a roster of individuals who have acted as or are interested in serving as conveners or facilitators in negotiated rulemaking proceedings. The roster shall include individuals from government agencies and private groups, and shall be made available upon request. Agencies may also use rosters maintained by other public or private individuals or organizations.

**(c) Procedures To Obtain Conveners and Facilitators.**

(1) Procedures. The Administrative Conference of the United States shall develop procedures which permit agencies to obtain the services of conveners and facilitators on an expedited basis.

(2) Payment for services. Payment for the services of conveners or facilitators shall be made by the agency using the services, unless the Chairman of the Administrative Conference agrees to pay for such services under subsection (f).

**(d) Compilation of Data on Negotiated Rulemaking; Report to Congress.**

(1) Compilation of data. The Administrative Conference of the United States shall compile and maintain data related to negotiated rulemaking and shall act as a clearinghouse to assist agencies and parties participating in negotiated rulemaking proceedings.

(2) Submission of information by agencies. Each agency engaged in negotiated rulemaking shall provide to the Administrative Conference of the United States a copy of any reports submitted to the agency by negotiated rulemaking committees under section 566 and

such additional information as necessary to enable the Administrative Conference of the United States to comply with this subsection.

(3) Reports to congress. The Administrative Conference of the United States shall review and analyze the reports and information received under this subsection and shall transmit a biennial report to the Committee on Governmental Affairs of the Senate and the appropriate committees of the House of Representatives that

(A) provides recommendations for effective use by agencies of negotiated rulemaking; and

(B) describes the nature and amounts of expenditures made by the Administrative Conference of the United States to accomplish the purposes of this subchapter.

**(e) Training in Negotiated Rulemaking.** The Administrative Conference of the United States is authorized to provide training in negotiated rulemaking techniques and procedures for personnel of the Federal Government either on a reimbursable or nonreimbursable basis. Such training may be extended to private individuals on a reimbursable basis.

**(f) Payment of Expenses of Agencies.** The Chairman of the Administrative Conference of the United States is authorized to pay, upon request of an agency, all or part of the expenses of establishing a negotiated rulemaking committee and conducting a negotiated rulemaking. Such expenses may include, but are not limited to

(1) the costs of conveners and facilitators;

(2) the expenses of committee members determined by the agency to be eligible for assistance under section 568(c); and

(3) training costs.

Determinations with respect to payments under this section shall be at the discretion of such Chairman in furthering the use by Federal agencies of negotiated rulemaking.

**(g) Use of Funds of the Conference.** The Administrative Conference of the United States may apply funds received under section 595(c)(12) of this title to carry out the purposes of this subchapter.

(Added Pub. L. No. 101-648, §3(a), Nov. 29, 1990, 104 Stat. 4975.)

### §570. Judicial review

Any agency action relating to establishing, assisting, or terminating a negotiated rulemaking committee under this subchapter shall not be subject to judicial review. Nothing in this section shall bar judicial review of a rule if such judicial review is otherwise provided by law. A rule which is the product of negotiated rulemaking and is subject to judicial review shall not be accorded any greater deference by a court than a rule which is the product of other rulemaking procedures.

(Added Pub. L. No. 101-648, §3(a), Nov. 29, 1990, 104 Stat. 4976.)

# Negotiated Rulemaking Act

## Citations:

5 U.S.C. §§581-590;[1] enacted November 29, 1990, by Pub. L. No. 101-648, 104 Stat. 4969.

## Lead Agency:

Administrative Conference of the United States, Suite 500, 2120 L Street NW, Washington, DC 20037 (202) 254-7020.

## Overview:

The Negotiated Rulemaking Act of 1990 establishes a statutory framework for agency use of negotiated rulemaking to formulate proposed regulations. The Act supplements the rulemaking provisions of the Administrative Procedure Act (see Chapter 1), clarifying the authority of federal agencies to conduct negotiated rulemaking. It largely codifies the practice of those agencies that had previously used the procedure. While not requiring use of the technique, the Act allows each agency discretion about using negotiated rulemaking.

Negotiated rulemaking (sometimes known as "regulatory negotiation" or "reg-neg") has emerged in the 1980s as an alternative to traditional procedures for drafting proposed regulations. The essence of the idea is that in certain situations it is possible to bring together representatives of the agency and the various affected interest groups to negotiate the text of a proposed rule. The negotiators try to reach a consensus through a process of evaluating their own priorities and making tradeoffs to achieve an acceptable outcome on the issues of greatest importance to them. If they do achieve a consensus, then the resulting rule is likely to be easier to implement and the likelihood of subsequent litigation is diminished. Even in the absence of consensus on a draft rule, the process may be valuable as a means of better informing the regulatory agency of the issues and the concerns of the affected interests.

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[1] The Administrative Dispute Resolution Act (see Chapter 3), Pub. L. No. 101-552, also contains sections in title 5 of the U.S. Code numbered 581-590. H.R. 2549, 102d Congress, 1st session, would remedy this anomaly (see Chapter 3, footnote 1).

Negotiated rulemaking should be viewed as a supplement to the rulemaking provisions of the Administrative Procedure Act. This means that the negotiation sessions generally take place prior to issuance of the notice and the opportunity for the public to comment on a proposed rule that are required by the Act (5 U.S.C. §553). In some instances, negotiations may be appropriate at a later stage of the proceeding and have sometimes been used effectively in drafting the text of a final rule based on comments received.

In 1982 the Administrative Conference of the United States set forth criteria for identifying rulemaking situations for which reg-neg is likely to be successful (Recommendation 82-4, 1 CFR §305.82-4). These criteria were intended to guide agencies in making the key determination whether negotiated rulemaking is appropriate for particular regulatory problems. The Conference also suggested specific procedures to be followed by agencies in applying this approach. Additional refinements, based on a study of initial agency experiences with reg-neg, were recommended in 1985 (Recommendation 85-5, 1 CFR §305.85-5).

Much of the Negotiated Rulemaking Act is permissive, incorporating many of the criteria and procedures suggested in the Conference recommendations. The drafters intended that the Act not impair any rights otherwise retained by agencies or parties, and section 581 expressly provides that the Act is not intended to limit innovation or experimentation with the negotiated rulemaking process. Although the Act plainly permits an agency to publish as its own the consensus proposal adopted by the negotiating committee, nothing in the Act *requires* the agency to publish either a proposed or final rule merely because a negotiating committee proposed it.

Following the recommendations of the Conference, section 583 of the Act lists several criteria to be considered by agencies in determining whether to use negotiated rulemaking in any particular instance. It permits, but does not require, the use of outside impartial persons (referred to as "conveners") to assist the agency in identifying potential participants in the negotiation process. Section 584 requires public notice of planned negotiated rulemaking proceedings in the Federal Register and appropriate trade and specialized publications. Persons or interests believing that they are not adequately represented on the negotiating committee must be given an opportunity to apply for membership, though the agency retains discretion as to whether to grant such requests.

Section 585 makes clear that agencies establishing negotiating committees under the Act are also to comply with the Federal Advisory Committee Act (see Chapter 10). At least one member of the committee must be a representative of the agency. If, after considering the public responses to the published notice of intent to establish a negotiating committee under the Act, the agency determines not to do so, then the agency must publish a notice of that fact and the reasons for the decision.

Section 586 addresses procedures of the negotiating committee and provides for selection of a neutral "facilitator" or mediator to assist the committee in its deliberations.

Section 587 permits an agency to keep a negotiating committee in existence until promulgation of the final rule, but also allows earlier termination if the agency or the committee so chooses.

Options for agencies with respect to acquiring the services of conveners and facilitators are addressed in section 588.[2] Agencies are authorized to pay expenses of certain committee members in accordance with the Federal Advisory Committee Act. Section 589 authorizes the Conference to pay certain expenses at the request of an agency conducting a negotiated rulemaking. (Funding for this purpose is authorized by section 4 of the Act.)

To avoid creating new sources of potential litigation, section 590 provides that agency actions pertaining to *procedural* decisions in negotiated rulemaking are not subject to judicial review. However, otherwise available judicial review of the *rules* promulgated through the negotiation process is not affected by the Act.

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[2] See also Conference Recommendation 86-8, *Acquiring the Services of "Neutrals" for Alternative Means of Dispute Resolution*, 1 CFR §305.86-8; Ruttinger, Acquiring the Services of Neutrals for Alternative Means of Dispute Resolution and Negotiated Rulemaking, 1986 ACUS 863.

Section 5 of the Negotiated Rulemaking Act terminates the provisions of the Act after 6 years (November 29, 1996). Numerous federal agencies conducted negotiated rulemaking proceedings under other authority prior to adoption of the Negotiated Rulemaking Act. Expiration of this Act clearly does not imply that an agency could no longer undertake a negotiated rulemaking.

## Legislative History:

Joint hearings on "regulatory negotiation" were held in July 1980 by the Senate's Select Committee on Small Business and Committee on Governmental Affairs. Legislation was introduced in September 1980 "to create a pilot program to encourage . . . the formation of regulatory negotiation commissions, comprised of representatives of business, public interest organizations, labor, State and local officials, and other interested persons, for the purpose of making recommendations to Federal agencies on regulatory policy." (H.R. 8240, 96th Congress) Other bills to establish a statutory framework for negotiated rulemaking were introduced in each subsequent Congress throughout the 1980s.

The first negotiated rulemaking bill to be acted upon was S. 1504, introduced by Senator Carl Levin in the 100th Congress. The Senate Committee on Governmental Affairs held hearings on May 13, 1988, and the Senate passed the bill on September 30, 1988 (134 Cong. Rec. S 13760, September 30, 1988; see also the report of the Senate Committee on Governmental Affairs, 100th Congress, 2d Session, S. Rep. No. 100-547). In the House, the Judiciary Subcommittee on Administrative Law and Governmental Relations held a hearing on August 10, 1988, on a companion bill, H.R. 3052, introduced by Representative Donald Pease. No further action was taken.

In the 101st Congress, identical bills, S. 303 and H.R. 743, were introduced on January 31, 1989 (135 Cong. Rec. S 862 and H 144, January 31, 1989). The Senate Committee on Governmental Affairs reported out S. 303 on July 13, 1989, and the Senate passed it on August 3, 1989 (see 135 Cong. Rec. S 10060, August 3, 1989; see also the report of the Senate Committee on Governmental Affairs, 101st Congress, 1st Session, S. Rep. No. 101-97).

The House Subcommittee held a hearing on H.R. 743 on May 3, 1989, and on February 7, 1990, reported out the bill with amendments. The Committee on the Judiciary passed the bill on March 28, and the House passed it on May 1 (136 Cong. Rec. H 1852, May 1, 1990; see also the report of the House Committee on the Judiciary, 101st Congress, 2d Session, H. Rep. No. 101-461). The Senate amended the bill further and passed S. 303 again on October 4 (136 Cong. Rec. S 14580, October 4, 1990). The House accepted the Senate amendments, voting final passage on October 22 (136 Cong. Rec. H 10966, October 22, 1990). The bill was signed by President Bush on November 29, 1990.

During the period of congressional consideration of the Negotiated Rulemaking Act, Congress passed three other pieces of legislation that mandated use of negotiated rulemaking: the Carl D. Perkins Vocational and Applied Technology Education Act Amendments (Pub. L. No. 101-392), the Hawkins-Stafford Elementary and Secondary School Improvements Amendments (Pub. L. No. 100-297), and the Price-Anderson Amendments Act of 1988 (Pub. L. No. 100-408). Each of these laws provided specific and widely differing procedures for negotiating rules. In the future, the Negotiated Rulemaking Act may serve as a common reference whenever Congress wants to use reg-neg in other legislation, replacing this ad hoc approach.

## Significant Case Law:

EPA's final rule on asbestos-containing materials in schools was the first reg-neg rule to be challenged in court. The suit was brought by the Safe Buildings Alliance, a group representing former manufacturers of asbestos building products that are now illegal. Plaintiffs in the lawsuit claimed that the rule would encourage unnecessary removal of materials from buildings and would result in a chaotic situation. They sought a more objective standard--based on air monitoring, for example--rather than the professional judgment called for under EPA's rule. The Safe Buildings Alliance had been represented on the negotiating committee. Several other parties who were represented on the negotiating committee intervened *in support of the final rule* as published. These included the National Education Association, the American Association of School Administrators, and a group of state attorneys general.

In May 1988, the rule was upheld by the U.S. Court of Appeals for the D.C. Circuit, *Safe Buildings Alliance v. EPA*, 846 F.2d 79 (D.C. Cir. 1988). The court determined that EPA's regulation embodied a reasonable interpretation of the requirements of the Asbestos Hazard Emergency Response Act of 1986, Pub. L. No. 99-519, 15 U.S.C. §§2641-54. Neither the appeal nor the court's decision referred to the negotiation procedure that was followed. EPA's underground injection rule, based in part on negotiated rulemaking, was also challenged and essentially upheld by the D.C. Circuit, *Natural Resources Defense Council v. EPA*, 907 F.2d 1146 (D.C. Cir. 1990).

## Source Note:

In 1990 the Administrative Conference of the United States published the *Negotiated Rulemaking Sourcebook*, a step-by-step guide to the conduct of negotiated rulemaking proceedings. The volume contains a discussion of when and how to use the procedure, along with sample notices and other documents that may be needed by an agency using the process. Numerous articles, both analytical and practical, are reprinted in the *Sourcebook*, including the Harter and Perritt reports to the Conference that furnished the research background for Conference Recommendations 82-4 and 85-5. An extensive bibliography is also included.

## Bibliography:

### I. Legislative History

1. *Regulatory Negotiation: Joint Hearings Before the Senate Select Committee on Small Business and the Subcommittee on Oversight of Government Management of the Senate Committee on Governmental Affairs*, 96th Cong., 2d Sess. (1980).

2. *Negotiated Rulemaking Act of 1987: Hearing before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary (H.R. 3052)*, 100th Cong., 2d Sess. (1988).

3. Senate Committee on Governmental Affairs, *Negotiated Rulemaking Act of 1988 (S. 1504)*, Rep. 100-547, 100th Cong., 2d Sess. (1988).

4. Senate Committee on Governmental Affairs, *Negotiated Rulemaking Act of 1989 (S. 303)*, Rep. 101-97, 101st Cong., 1st Sess. (1989).

5. *Negotiated Rulemaking Act of 1989: Hearing before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary (H.R. 743)*, 101st Cong., 1st Sess. (1989).

6. House Committee on the Judiciary, *Negotiated Rulemaking Act of 1990 (H.R. 743)*, Rep. 101-461, 101st Cong., 2d Sess. (1990).

7. *President's Statement on Signing the Negotiated Rulemaking Act of 1990*, 26 Weekly Comp. Pres. Doc. 1945 (Nov. 29, 1990).

## STATEMENT OF SENATOR CARL LEVIN
## BEFORE THE HOUSE SUBCOMMITTEE ON
## ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS
## ON H.R. 3052, THE NEGOTIATED RULEMAKING ACT

August 10, 1988

Mr. Chairman and Members of the Subcommittee, thank you for inviting me to testify today on H.R. 3052, the Negotiated Rulemaking Act. This bill, which was introduced by my friend, Congressman Don Pease, is a companion to S. 1504, a bill which I introduced in the Senate and which recently received approval by the Senate Governmental Affairs Committee to be reported to the floor for consideration by the full Senate. I am delighted that this Subcommittee is also considering this matter at this time.

As you know, negotiated rulemaking is a procedural device designed to encourage competing interests voluntarily to work together to achieve a consensus position on a controversial agency rulemaking. It is a process which invites parties who will be significantly affected by an agency rule to sit down together and negotiate in good faith to develop a draft regulation with which all the affected parties can live. Parties who successfully reach agreement on a draft then present it to the agency, with the expectation that the agency will use it as the basis for publishing a proposed rule in the Federal Register.

This process, called "reg neg" by veteran users, has been the subject of Congressional scrutiny since about 1980. In that year, I held hearings and introduced a bill to encourage agencies to try the process. Congress responded then with caution, reasoning that the process was too new and untried to warrant legislation. The suggestion was to let agencies try the process on their own, to experiment with it, and to develop a track record which Congress could then evaluate.

Eight years later we have that track record. A number of agencies, including the Environmental Protection Agency, the Labor Department, and the Transportation Department, have used negotiated rulemaking to develop regulations on such varied issues as wood burning stoves, pesticides, benzene exposure limits, and working hours for airline pilots. Numerous parties have participated in the process, from industry to labor to environmental groups to consumers. And they agree that negotiated rulemaking is a winner.

In a hearing held in May before the Senate Governmental Affairs Committee, testimony was provided about the Government's negotiated rulemaking experiences to date. The Committee heard from agencies, rulemaking participants, mediators and scholars. The witnesses agreed without exception that negotiated rulemaking has proven itself to be not only viable, but a very effective process when properly employed. Praise for the process included statements that, when used in the proper circumstances, negotiated rulemaking resulted in agency rules that were more effective, less costly, fairer in impact, quicker in achieving final status, and less subject to challenge in court. That's quite a track record.

And word is getting around in Congress. Provisions are appearing on an ad hoc basis in various bills directing agencies to use negotiated rulemaking when developing regulations in certain areas. Two examples are H.R. 5, the Elementary and Secondary School Improvement Act, now Public Law 100-297, which directs the Education Secretary to use reg neg to develop regulations required by the Act; and H.R. 1414, the Price-Anderson Amendments Act, which passed both Houses last week and which directs the Nuclear Regulatory Commission to use reg neg to resolve certain indemnification issues involving radiopharmaceuticals.

Given this trend as well as the desirability of encouraging proper use of the process, I believe it is time to provide a standardized framework for negotiated rulemaking. The key here is the word "framework." Negotiated rulemaking works best when it retains a flexible character that can be adapted to the exigencies of each rulemaking situation. To bind the process too tightly, with too many procedural rules, would be to destroy its best feature.

At the same time, agencies which have not tried reg neg want and need guidance on how to proceed. It is not obvious how an agency should conduct a negotiated rulemaking so that it is consistent with the Administrative Procedure Act and the Federal Advisory Committee Act. These are the types of procedural issues which can and should be resolved in a uniform manner for all negotiated rulemaking sessions. In addition, there is expert information and assistance available on reg neg issues which should be made easily accessible to all agencies thinking of participating in the process. Each of these goals can be achieved through the Negotiated Rulemaking Act.

H.R. 3052 establishes a framework for conducting a negotiated rulemaking. First, it requires an agency deciding whether to try negotiated rulemaking in a particular setting to consider a number of identified factors, such as whether there is a limited number of readily identifiable interests, whether a consensus is likely to be reached, and whether the agency is willing to consider using the consensus position as the basis for a proposed agency rule. Experience has shown that careful selection of when to use the process is vital to the success of a negotiated rulemaking, and the bill provides some tested standards and procedures for making that decision.

The bill also resolves key procedural issues, including how to publicize an agency decision to use negotiated rulemaking in a particular area, how to handle requests for additional participants, how to form a rulemaking committee in compliance with the Federal Advisory Committee Act, how to determine reimbursement of committee expenses, and how to use negotiated rulemaking in a manner that is consistent with the Administrative Procedure Act's requirements for proposed agency rules. In addition, the bill assigns to the Administrative Conference of the United States the responsibility to act as a clearinghouse for information and assistance.

As originally introduced, H.R. 3052 and S. 1504 were identical measures. In response to suggestions made by witnesses at the April hearing, however, we refined provisions in S. 1504 to improve the mechanisms guaranteeing flexibility and to reduce red tape. It was this improved bill that was ordered reported to the Senate floor. I hope the Subcommittee will review this revised bill at the same time it is considering the provisions of H.R. 3052.

The potential benefits of the negotiated rulemaking process have always been clear. Instead of affected parties spending their time and resources litigating a rule drafted and imposed by an agency, the affected parties and the agency spend their time and energies constructively developing a proposed rule together. The potential result is not only a rule which will become effective in less time, but also a rule which will be better substantively, since it will reflect the involvement of knowledgeable persons who will be directly affected by it.

Eight years ago, there was little evidence that these potential benefits of negotiated rulemaking would actually accrue. Now, we have a track record of success. Congress needs to extend that record of success by encouraging more agencies to try negotiated rulemaking under procedures which will guide but not inhibit the process. This is legislation whose time has come, and I ask this Subcommittee to act on H.R. 3052 to help it become law before the 100th Congress comes to its close.

### § 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 383.)

## Recommendation 77-3, 1 CFR §305.77-3

### § 305.77-3 Ex parte Communications in Informal Rulemaking Proceedings (Recommendation No. 77-3).

In Recommendation 72-5 the Conference expressed the view that, generally, agency rulemaking is preferably carried out through the simple, flexible and efficient procedures of 5 U.S.C. 553. That statute requires publication of notice of proposed rulemaking and provision of opportunity for submission of written comments; additional procedures may be utilized by the agencies as they deem necessary or appropriate. Recommendation 72-5 counseled that Congress ordinarily should not impose mandatory procedural requirements going beyond those of section 553 in the absence of special reasons for doing so. In Recommendation 76-3 the Conference amplified its 1972 recommendation by suggesting ways in which agencies might usefully supplement the minimum procedures required by section 553 in appropriate circumstances.

The primary purposes of rulemaking procedures under section 553 are to enhance the agency's knowledge of the subject matter of the proposed rule and to afford all interested persons an adequate opportunity to provide data, views, and arguments with respect to the agency's proposals and any alternative proposals of other interested persons. Section 553 procedures, in some instances, also serve to provide the basis for judicial review. To the extent consistent with all of these purposes, the agencies should have broad discretion to fashion procedures appropriate to the nature and importance of the issues in the proceeding, in order to make rules without undue delay or expense. Informal rulemaking should not be subject to the constraints of the adversary process. Ease of access to information and opinions, whether by recourse to published material, by field research and empirical studies, by consultation with informed persons, or by other means, should not be impaired.

While the foregoing considerations militate against a general prohibition upon ex parte communications in rulemaking subject only to section 553, certain restraints upon such communications may be desirable. Ex parte communications during the rulemaking process can give rise to three principal types of concerns. First, decision makers may be influenced by communications made privately, thus creating a situation seemingly at odds with the widespread demand for open government; second, significant information may be unavailable to reviewing courts; and third, interested persons may be unable to reply effectively to information, proposals or arguments presented in an ex parte communication. In the context of section 553 rulemaking, the first two problems can be alleviated by placing written communications addressed to a rule proposal in a public file, and by disclosure of significant oral communications by means of summaries or other appropriate techniques. The very nature of such rulemaking, however, precludes any simple solution to the third difficulty. The opportunity of interested persons to reply could be fully secured only by converting rulemaking proceedings into a species of adjudication in which such persons were identified, as parties, and entitled to be, at least constructively, present when all information and arguments are assembled in a record. In general rulemaking, where there may be thousands of interested persons and where the issues tend to be broad questions of policy with respect to which illumination may come from a vast variety of sources not specifically identifiable, the constraints appropriate for adjudication are neither practicable nor desirable.

### RECOMMENDATION

In rulemaking proceedings subject only to the procedural requirements of section 553 of the APA:

1. A general prohibition applicable to all agencies against the receipt of private oral or written communications is undesirable, because it would deprive agencies of the flexibility needed to fashion rulemaking procedures appropriate to the issues involved, and would introduce a degree of formality that would, at least in most instances, result in procedures that are unduly complicated, slow and expensive, and, at the same time, perhaps not conducive to developing all relevant information.

2. All written communications addressed to the merits, received after notice of proposed rulemaking and in its course, from outside the agency by an agency or its personnel participating in the decision should be placed promptly in a file available for public inspection.

3. Agencies should experiment in appropriate situations with procedures designed to disclose oral communications from outside the agency of significant information or argument re-

specting the merits of proposed rules, made to agency personnel participating in the decision on the proposed rule, by means of summaries promptly placed in the public file, meetings which the public may attend, or other techniques appropriate to their circumstances. To the extent that summaries are utilized they ordinarily should identify the source of the communications, but need not do so when the information or argument is cumulative. Except to the extent the agencies expressly provide, the provisions of this paragraph and the preceding paragraph should not be construed to create new rights to oral proceedings or to extensions of the periods for comment on proposed rules.

4. An agency may properly withhold from the public file, and exempt from requirements for making summaries, information exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552.

5. Agencies or the Congress or the courts might conclude of course that restrictions on ex parte communications in particular proceedings or in limited rulemaking categories are necessitated by considerations of fairness or the needs of judicial review arising from special circumstances.

[42 FR 54253, Oct. 5, 1977]

# TITLE 5 APPENDIX, UNITED STATES CODE

## FEDERAL ADVISORY COMMITTEE ACT

Pub. L. 92-463, Oct. 6, 1972, 86 Stat. 770, as amended by Pub. L. 94-409, § 5(c), Sept. 13, 1976, 90 Stat. 1247; Pub. L. 96-523, § 2, Dec. 12, 1980, 94 Stat. 3040; Pub. L. 97-375, title II, § 201(c), Dec. 21, 1982, 96 Stat. 1822

### § 1. Short title

This Act may be cited as the "Federal Advisory Committee Act".

#### Act Referred to in Other Sections

The Federal Advisory Committee Act is referred to in title 7 sections 450i, 499t, 511d, 2020, 2204b, 2286, 3152; title 8 section 1356; title 10 section 867; title 12 sections 1441, 1701q, 2246; title 15 sections 78k-1, 776, 2080, 4802, 4806; title 16 sections 410nn-3, 410pp-4, 460vv-12, 460ww-5, 463, 470q, 541g, 1533, 1612, 1826, 1852, 3602, 3632; title 19 sections 2155, 2605; title 20 section 1221e-1; title 22 sections 2124b, 2194b, 4833; title 24 section 225b; title 29 section 1302; title 33 section 2251; title 42 sections 282, 290aa, 300v-3, 2486h, 3788, 5816, 6007, 6374c, 6708, 6838, 7234, 10173b, 10248; title 43 sections 1600b, 1739, 1753; title 45 sections 431, 1116, 1212; title 46 App. section 1295b; title 47 section 332; title 49 App. section 1903; title 50 App. sections 2158, 2158a, 2169.

### § 2. Findings and purpose

(a) The Congress finds that there are numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the Federal Government and that they are frequently a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government.

(b) The Congress further finds and declares that—

(1) the need for many existing advisory committees has not been adequately reviewed:

(2) new advisory committees should be established only when they are determined to be essential and their number should be kept to the minimum necessary;

(3) advisory committees should be terminated when they are no longer carrying out the purposes for which they were established;

(4) standards and uniform procedures should govern the establishment, operation, administration, and duration of advisory committees;

(5) the Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees; and

(6) the function of advisory committees should be advisory only, and that all matters under their consideration should be determined, in accordance with law, by the official, agency, or officer involved.

#### Executive Order No. 11686

Ex. Ord. No. 11686, Oct. 7, 1972, 37 F.R. 21421, which related to committee management, was superseded by Ex. Ord. No. 11769, Feb. 21, 1974, 39 F.R. 7125, formerly set out as a note under this section.

#### Executive Order No. 11769

Ex. Ord. No. 11769, Feb. 21, 1974, 39 F.R. 7125, which related to committee management, was revoked by Ex. Ord. No. 12024, Dec. 1, 1977, 42 F.R. 61445, set out as a note below.

#### Ex. Ord. No. 12024. Transfer of Certain Advisory Committee Functions

Ex. Ord. No. 12024, Dec. 1, 1977, 42 F.R. 61445, provided:

By virtue of the authority vested in me by the Constitution and statutes of the United States of America, including the Federal Advisory Committee Act, as amended (5 U.S.C. App.), Section 301 of Title 3 of the United States Code, Section 202 of the Budget and Accounting Procedures Act of 1950 (31 U.S.C. 581c) [31 U.S.C. 1531], and Section 7 of Reorganization Plan No. 1 of 1977 (42 F.R. 56101 (October 21, 1977)) [set out in this Appendix], and as President of the United States of America, in accord with the transfer of advisory committee functions from the Office of Management and Budget to the General Services Administration provided by Reorganization Plan No. 1 of 1977, it is hereby ordered as follows:

Section 1. The transfer, provided by Section 5F of Reorganization Plan No. 1 of 1977 (42 F.R. 56101) [set out in this Appendix], of certain functions under the Federal Advisory Committee Act, as amended (5 U.S.C. App.), from the Office of Management and Budget and its Director to the Administrator of General Services is hereby effective.

Sec. 2. There is hereby delegated to the Administrator of General Services all the functions vested in the

President by the Federal Advisory Committee Act, as amended, except that, the annual report to the Congress required by Section 6(c) of that Act shall be prepared by the Administrator for the President's consideration and transmittal to the Congress.

Sec. 3. The Director of the Office of Management and Budget shall take all actions necessary or appropriate to effectuate the transfer of functions provided in this Order, including the transfer of funds, personnel and positions, assets, liabilities, contracts, property, records, and other items related to the functions transferred.

Sec. 4. Executive Order No. 11769 of February 21, 1974 is hereby revoked.

Sec. 5. Any rules, regulations, orders, directives, circulars, or other actions taken pursuant to the functions transferred or reassigned as provided in this Order from the Office of Management and Budget to the Administrator of General Services, shall remain in effect as if issued by the Administrator until amended, modified, or revoked.

Sec. 6. This Order shall be effective November 20, 1977.

Jimmy Carter.

### § 3. Definitions

For the purpose of this Act—

(1) The term "Administrator" means the Administrator of General Services.

(2) The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as "committee"), which is—

(A) established by statute or reorganization plan, or

(B) established or utilized by the President, or

(C) established or utilized by one or more agencies,

in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) the Advisory Commission on Intergovernmental Relations, (ii) the Commission on Government Procurement, and (iii) any committee which is composed wholly of full-time officers or employees of the Federal Government.

(3) The term "agency" has the same meaning as in section 551(1) of title 5, United States Code.

(4) The term "Presidential advisory committee" means an advisory committee which advises the President.

(As amended 1977 Reorg. Plan No. 1, § 5F, eff. Nov. 20, 1977, 42 F.R. 56101, 91 Stat. 1634.)

#### TRANSFER OF FUNCTIONS

"'Administrator' means the Administrator of General Services" was substituted for "'Director' means the Director of the Office of Management and Budget" in par. (1) pursuant to Reorg. Plan No. 1 of 1977, § 5F, 42 F.R. 56101, 91 Stat. 1634, set out in this Appendix, which transferred all functions of the Office of Management and Budget and the Director thereof relating to the Committee Management Secretariat to the Administrator of General Services, effective Nov. 20, 1977, as provided by section 1 of Ex. Ord. No. 12024, Dec. 1, 1977, 42 F.R. 61445, set out under section 2 of this Act in this Appendix.

#### COMMISSION ON GOVERNMENT PROCUREMENT

The Commission on Government Procurement, referred to in par. (2)(ii), terminated Apr. 30, 1973, pursuant to Pub. L. 91-129, set out as a note under section 251 of Title 41, Public Contracts.

### § 4. Applicability; restrictions

(a) The provisions of this Act or of any rule, order, or regulation promulgated under this Act shall apply to each advisory committee except to the extent that any Act of Congress establishing any such advisory committee specifically provides otherwise.

(b) Nothing in this Act shall be construed to apply to any advisory committee established or utilized by—

(1) the Central Intelligence Agency; or

(2) the Federal Reserve System.

(c) Nothing in this Act shall be construed to apply to any local civic group whose primary function is that of rendering a public service with respect to a Federal program, or any State or local committee, council, board, commission, or similar group established to advise or make recommendations to State or local officials or agencies.

### § 5. Responsibilities of Congressional committees; review; guidelines

(a) In the exercise of its legislative review function, each standing committee of the Senate and the House of Representatives shall make a continuing review of the activities of each advisory committee under its jurisdiction to determine whether such advisory committee should be abolished or merged with any other advisory committee, whether the responsibilities of such advisory committee should be revised, and whether such advisory committee performs a necessary function not already being performed. Each such standing committee shall take appropriate action to obtain the enactment of legislation necessary to carry out the purpose of this subsection.

(b) In considering legislation establishing, or authorizing the establishment of any advisory committee, each standing committee of the Senate and of the House of Representatives shall determine, and report such determination to the Senate or to the House of Representatives, as the case may be, whether the functions of the proposed advisory committee are being or could be performed by one or more agencies or by an advisory committee already in existence, or by enlarging the mandate of an existing advisory committee. Any such legislation shall—

(1) contain a clearly defined purpose for the advisory committee;

(2) require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee;

(3) contain appropriate provisions to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the

result of the advisory committee's independent judgment;

(4) contain provisions dealing with authorization of appropriations, the date for submission of reports (if any), the duration of the advisory committee, and the publication of reports and other materials, to the extent that the standing committee determines the provisions of section 10 of this Act to be inadequate; and

(5) contain provisions which will assure that the advisory committee will have adequate staff (either supplied by an agency or employed by it), will be provided adequate quarters, and will have funds available to meet its other necessary expenses.

(c) To the extent they are applicable, the guidelines set out in subsection (b) of this section shall be followed by the President, agency heads, or other Federal officials in creating an advisory committee.

### § 6. Responsibilities of the President; report to Congress; annual report to Congress; exclusion

(a) The President may delegate responsibility for evaluating and taking action, where appropriate, with respect to all public recommendations made to him by Presidential advisory committees.

(b) Within one year after a Presidential advisory committee has submitted a public report to the President, the President or his delegate shall make a report to the Congress stating either his proposals for action or his reasons for inaction, with respect to the recommendations contained in the public report.

(c) The President shall, not later than December 31 of each year, make an annual report to the Congress on the activities, status, and changes in the composition of advisory committees in existence during the preceding fiscal year. The report shall contain the name of every advisory committee, the date of and authority for its creation, its termination date or the date it is to make a report, its functions, a reference to the reports it has submitted, a statement of whether it is an ad hoc or continuing body, the dates of its meetings, the names and occupations of its current members, and the total estimated annual cost to the United States to fund, service, supply, and maintain such committee. Such report shall include a list of those advisory committees abolished by the President, and in the case of advisory committees established by statute, a list of those advisory committees which the President recommends be abolished together with his reasons therefor. The President shall exclude from this report any information which, in his judgment, should be withheld for reasons of national security, and he shall include in such report a statement that such information is excluded.

(As amended Pub. L. 97-375, title II, § 201(c), Dec. 21, 1982, 96 Stat. 1822.)

#### AMENDMENTS

1982—Subsec. (c). Pub. L. 97-375 substituted provision that the President shall, not later than Dec. 31 of each year, make an annual report to Congress on the activities, status, and changes in the composition of advisory committees in existence during the preceding fiscal year, for provision the President, not later than March 31 of each calendar year after 1972, make an annual report to Congress on the activities, status, and changes in the composition of advisory committees in existence during the preceding calendar year.

#### EFFECTIVE DATE OF 1982 AMENDMENT

Section 210(c) of Pub. L. 97-375 provided in part that the amendment by Pub. L. 97-375 is effective July 1, 1983.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 7 sections 2270, 2284.

### § 7. Responsibilities of the Administrator of General Services; Committee Management Secretariat, establishment; review; recommendations to President and Congress; agency cooperation; performance guidelines; uniform pay guidelines; travel expenses; expense recommendations

(a) The Administrator shall establish and maintain within the General Services Administration a Committee Management Secretariat, which shall be responsible for all matters relating to advisory committees.

(b) The Administrator shall, immediately after October 6, 1972, institute a comprehensive review of the activities and responsibilities of each advisory committee to determine—

(1) whether such committee is carrying out its purpose;

(2) whether, consistent with the provisions of applicable statutes, the responsibilities assigned to it should be revised;

(3) whether it should be merged with other advisory committees; or

(4) whether it should be abolished.

The Administrator may from time to time request such information as he deems necessary to carry out his functions under this subsection. Upon the completion of the Administrator's review he shall make recommendations to the President and to either the agency head or the Congress with respect to action he believes should be taken. Thereafter, the Administrator shall carry out a similar review annually. Agency heads shall cooperate with the Administrator in making the reviews required by this subsection.

(c) The Administrator shall prescribe administrative guidelines and management controls applicable to advisory committees, and, to the maximum extent feasible, provide advice, assistance, and guidance to advisory committees to improve their performance. In carrying out his functions under this subsection, the Administrator shall consider the recommendations of each agency head with respect to means of improving the performance of advisory committees whose duties are related to such agency.

(d)(1) The Administrator, after study and consultation with the Director of the Office of Personnel Management, shall establish guidelines with respect to uniform fair rates of pay for comparable services of members, staffs, and consultants of advisory committees in a manner which gives appropriate recognition to the responsibilities and qualifications required and other relevant factors. Such regulations shall provide that—

(A) no member of any advisory committee or of the staff of any advisory committee shall receive compensation at a rate in excess of the rate specified for GS-18 of the General Schedule under section 5332 of title 5, United States Code;

(B) such members, while engaged in the performance of their duties away from their homes or regular places of business, may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5, United States Code, for persons employed intermittently in the Government service; and

(C) such members—

(i) who are blind or deaf or who otherwise qualify as handicapped individuals (within the meaning of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 794)), and

(ii) who do not otherwise qualify for assistance under section 3102 of title 5, United States Code, by reason of being an employee of an agency (within the meaning of section 3102(a)(1) of such title 5),

may be provided services pursuant to section 3102 of such title 5 while in performance of their advisory committee duties.

(2) Nothing in this subsection shall prevent—

(A) an individual who (without regard to his service with an advisory committee) is a full-time employee of the United States, or

(B) an individual who immediately before his service with an advisory committee was such an employee,

from receiving compensation at the rate at which he otherwise would be compensated (or was compensated) as a full-time employee of the United States.

(e) The Administrator shall include in budget recommendations a summary of the amounts he deems necessary for the expenses of advisory committees, including the expenses for publication of reports where appropriate.

(As amended 1977 Reorg. Plan No. 1, § 5F, eff. Nov. 20, 1977, 42 F.R. 56101, 91 Stat. 1634; 1978 Reorg. Plan No. 2, § 102, eff. Jan. 1, 1979, 43 F.R. 36067, 92 Stat. 3783; Pub. L. 96-523, § 2, Dec. 12, 1980, 94 Stat. 3040.)

### REFERENCES IN TEXT

Section 501 of the Rehabilitation Act of 1973, referred to in subsec. (d)(1)(C)(i), is classified to section 791 of Title 29, Labor, rather than to section 794 of Title 29 as shown in text.

### AMENDMENTS

1980—Subsec. (d)(1)(C). Pub. L. 96-523 added subpar. (C).

### EFFECTIVE DATE OF 1980 AMENDMENT

Amendment by Pub. L. 96-523 effective sixty days after Dec. 12, 1980, see section 3 of Pub. L. 96-523, set out as a note under section 3102 of this title.

### TRANSFER OF FUNCTIONS

"Director of the Office of Personnel Management" was substituted for "Civil Service Commission" in subsec. (d) pursuant to Reorg. Plan No. 2 of 1978, § 102, 43 F.R. 36037, 92 Stat. 3783, set out under section 1101 of this title, which transferred all functions vested by statute in the United States Civil Service Commission to the Director of the Office of Personnel Management (except as otherwise specified), effective Jan. 1, 1979, as provided by section 1-102 of Ex. Ord. No. 12107, Dec. 28, 1978, 44 F.R. 1055, set out under section 1101 of this title.

"Administrator", "Administrator's", "Administrator of General Services", and "General Services Administration" were substituted for "Director", "Director's", "Director, Office of Management and Budget", and "Office of Management and Budget" in text pursuant to Reorg. Plan No. 1 of 1977, § 5F, 42 F.R. 56101, 91 Stat. 1634, set out in this Appendix, which transferred all functions of the Office of Management and Budget and the Director thereof relating to the Committee Management Secretariat to the Administrator of General Services, effective Nov. 20, 1977, as provided by section 1 of Ex. Ord. No. 12024, Dec. 1, 1977, 42 F.R. 61445, set out under section 2 of this Act in this Appendix.

### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 7 section 5005; title 12 section 1428a.

## § 8. Responsibilities of agency heads; Advisory Committee Management Officer, designation

(a) Each agency head shall establish uniform administrative guidelines and management controls for advisory committees established by that agency, which shall be consistent with directives of the Administrator under section 7 and section 10. Each agency shall maintain systematic information on the nature, functions, and operations of each advisory committee within its jurisdiction.

(b) The head of each agency which has an advisory committee shall designate an Advisory Committee Management Officer who shall—

(1) exercise control and supervision over the establishment, procedures, and accomplishments of advisory committees established by that agency;

(2) assemble and maintain the reports, records, and other papers of any such committee during its existence; and

(3) carry out, on behalf of that agency, the provisions of section 552 of title 5, United States Code, with respect to such reports, records, and other papers.

(As amended 1977 Reorg. Plan No. 1, § 5F, eff. Nov. 20, 1977, 42 F.R. 56101, 91 Stat. 1634.)

### TRANSFER OF FUNCTIONS

"Administrator", meaning Administrator of General Services was substituted for "Director", meaning Director of the Office of Management and Budget, in subsec. (a) pursuant to Reorg. Plan No. 1 of 1977, § 5F, 42 F.R. 56101, 91 Stat. 1634, set out in this Appendix, which transferred all functions of the Office of Management and Budget and the Director thereof relating to the Committee Management Secretariat to the Administrator of General Services, effective Nov. 20, 1977, as provided by section 1 of Ex. Ord. No. 12024, Dec. 1, 1977, 42 F.R. 61445, set out under section 2 of this Act in this Appendix.

## § 9. Establishment and purpose of advisory committees; publication in Federal Register; charter: filing, contents, copy

(a) No advisory committee shall be established unless such establishment is—

(1) specifically authorized by statute or by the President; or

(2) determined as a matter of formal record, by the head of the agency involved after consultation with the Administrator, with timely notice published in the Federal Register, to be in the public interest in connection with the performance of duties imposed on that agency by law.

(b) Unless otherwise specifically provided by statute or Presidential directive, advisory committees shall be utilized solely for advisory functions. Determinations of action to be taken and policy to be expressed with respect to matters upon which an advisory committee reports or makes recommendations shall be made solely by the President or an officer of the Federal Government.

(c) No advisory committee shall meet or take any action until an advisory committee charter has been filed with (1) the Administrator, in the case of Presidential advisory committees, or (2) with the head of the agency to whom any advisory committee reports and with the standing committees of the Senate and of the House of Representatives having legislative jurisdiction of such agency. Such charter shall contain the following information:

(A) the committee's official designation;

(B) the committee's objectives and the scope of its activity;

(C) the period of time necessary for the committee to carry out its purposes;

(D) the agency or official to whom the committee reports;

(E) the agency responsible for providing the necessary support for the committee;

(F) a description of the duties for which the committee is responsible, and, if such duties are not solely advisory, a specification of the authority for such functions;

(G) the estimated annual operating costs in dollars and man-years for such committee;

(H) the estimated number and frequency of committee meetings;

(I) the committee's termination date, if less than two years from the date of the committee's establishment; and

(J) the date the charter is filed.

A copy of any such charter shall also be furnished to the Library of Congress.

(As amended 1977 Reorg. Plan No. 1, § 5F, eff. Nov. 20, 1977, 42 F.R. 56101, 91 Stat. 1634.)

### TRANSFER OF FUNCTIONS

"Administrator", meaning Administrator of General Services was substituted for "Director", meaning Director of the Office of Management and Budget, in subsecs. (a)(2) and (c) pursuant to Reorg. Plan No. 1 of 1977, § 5F, 42 F.R. 56101, 91 Stat. 1634, set out in this Appendix, which transferred all functions of the Office of Management and Budget and the Director thereof relating to the Committee Management Secretariat to the Administrator of General Services, effective Nov. 20, 1977, as provided by section 1 of Ex. Ord. No. 12024, Dec. 1, 1977, 42 F.R. 61445, set out under section 2 of this Act in this Appendix.

### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 7 sections 2270, 2289.

## § 10. Advisory committee procedures; meetings; notice, publication in Federal Register; regulations; minutes; certification; annual report; Federal officer or employee, attendance

(a)(1) Each advisory committee meeting shall be open to the public.

(2) Except when the President determines otherwise for reasons of national security, timely notice of each such meeting shall be published in the Federal Register, and the Administrator shall prescribe regulations to provide for other types of public notice to insure that all interested persons are notified of such meeting prior thereto.

(3) Interested persons shall be permitted to attend, appear before, or file statements with any advisory committee, subject to such reasonable rules or regulations as the Administrator may prescribe.

(b) Subject to section 552 of title 5, United States Code, the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.

(c) Detailed minutes of each meeting of each advisory committee shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the advisory committee. The accuracy of all minutes shall be certified to by the chairman of the advisory committee.

(d) Subsections (a)(1) and (a)(3) of this section shall not apply to any portion of an advisory committee meeting where the President, or the head of the agency to which the advisory committee reports, determines that such portion of such meeting may be closed to the public in accordance with subsection (c) of section 552b of title 5, United States Code. Any such determination shall be in writing and shall contain the reasons for such determination. If such a determination is made, the advisory committee shall issue a report at least annually setting forth a summary of its activities and such related matters as would be informative to the public consistent with the policy of section 552(b) of title 5, United States Code.

(e) There shall be designated an officer or employee of the Federal Government to chair or attend each meeting of each advisory committee. The officer or employee so designated is authorized, whenever he determines it to be in the public interest, to adjourn any such meeting. No advisory committee shall conduct any meeting in the absence of that officer or employee.

(f) Advisory committees shall not hold any meetings except at the call of, or with the advance approval of, a designated officer or employee of the Federal Government, and in the case of advisory committees (other than Presidential advisory committees), with an agenda approved by such officer or employee.

(As amended Pub. L. 94-409, § 5(c), Sept. 13, 1976, 90 Stat. 1247; 1977 Reorg. Plan No. 1, § 5F, eff. Nov. 20, 1977, 42 F.R. 56101, 91 Stat. 1634.)

#### Amendments

1976—Subsec. (d). Pub. L. 94-409 inserted "portion of an" after "to any" and substituted provisions relating to determinations for closing to the public such portion of the meeting in accordance with section 552b(c) of title 5, for provisions relating to determinations of matters listed in section 552(b) of title 5.

#### Effective Date of 1976 Amendment

Amendment by Pub. L. 94-409 effective 180 days after Sept. 13, 1976, see section 6 of Pub. L. 94-409, set out as an Effective Date note under section 552b of this title.

#### Transfer of Functions

"Administrator", meaning Administrator of General Services was substituted for "Director", meaning Director of the Office of Management and Budget, in subsec. (a)(2), (3) pursuant to Reorg. Plan No. 1 of 1977, § 5F, 42 F.R. 56101, 91 Stat. 1634, set out in this Appendix, which transferred all functions of the Office of Management and Budget and the Director thereof relating to the Committee Management Secretariat to the Administrator of General Services, effective Nov. 20, 1977, as provided by section 1 of Ex. Ord. No. 12024, Dec. 1, 1977, 42 F.R. 61445, set out under section 2 of this Act in this Appendix.

#### Section Referred to in Other Sections

This section is referred to in title 7 section 5005; title 19 sections 2155, 2605; title 20 section 1233h; title 30 section 1229; title 42 sections 1395ww, 6273; title 50 App. section 2158a.

### § 11. Availability of transcripts; "agency proceeding"

(a) Except where prohibited by contractual agreements entered into prior to the effective date of this Act, agencies and advisory committees shall make available to any person, at actual cost of duplication, copies of transcripts of agency proceedings or advisory committee meetings.

(b) As used in this section "agency proceeding" means any proceeding as defined in section 551(12) of title 5, United States Code.

#### References in Text

Effective date of this Act, referred to in subsec. (a), as meaning effective upon expiration of ninety days following enactment of Pub. L. 92-463 on Oct. 6, 1972, see section 15 of Pub. L. 92-463.

#### Section Referred to in Other Sections

This section is referred to in title 15 section 4806; title 19 sections 2155, 2605; title 42 section 6273; title 50 App. section 2158a.

### § 12. Fiscal and administrative provisions; recordkeeping; audit; agency support services

(a) Each agency shall keep records as will fully disclose the disposition of any funds which may be at the disposal of its advisory committees and the nature and extent of their activities. The General Services Administration, or such other agency as the President may designate, shall maintain financial records with respect to Presidential advisory committees. The Comptroller General of the United States, or any of his authorized representatives, shall have access, for the purpose of audit and examination, to any such records.

(b) Each agency shall be responsible for providing support services for each advisory committee established by or reporting to it unless the establishing authority provides otherwise. Where any such advisory committee reports to more than one agency, only one agency shall be responsible for support services at any one time. In the case of Presidential advisory committees, such services may be provided by the General Services Administration.

#### Section Referred to in Other Sections

This section is referred to in title 7 section 5005.

### § 13. Responsibilities of Library of Congress; reports and background papers; depository

Subject to section 552 of title 5, United States Code, the Administrator shall provide for the filing with the Library of Congress of at least eight copies of each report made by every advisory committee and, where appropriate, background papers prepared by consultants. The Librarian of Congress shall establish a depository for such reports and papers where they shall be available to public inspection and use.

(As amended 1977 Reorg. Plan No. 1, § 5F, eff. Nov. 20, 1977, 42 F.R. 56101, 91 Stat. 1634.)

#### Transfer of Functions

"Administrator", meaning Administrator of General Services was substituted for "Director", meaning Director of the Office of Management and Budget, in text pursuant to Reorg. Plan No. 1 of 1977, § 5F, 42 F.R. 56101, 91 Stat. 1634, set out in this Appendix, which transferred all functions of the Office of Management and Budget and the Director thereof relating to the Committee Management Secretariat to the Administrator of General Services, effective Nov. 20, 1977, as provided by section 1 of Ex. Ord. No. 12024, Dec. 1, 1977, 42 F.R. 61445, set out under section 2 of this Act in this Appendix.

### § 14. Termination of advisory committees; renewal; continuation

(a)(1) Each advisory committee which is in existence on the effective date of this Act shall terminate not later than the expiration of the two-year period following such effective date unless—

(A) in the case of an advisory committee established by the President or an officer of the Federal Government, such advisory committee is renewed by the President or that officer by appropriate action prior to the expiration of such two-year period; or

(B) in the case of an advisory committee established by an Act of Congress, its duration is otherwise provided for by law.

(2) Each advisory committee established after such effective date shall terminate not later than the expiration of the two-year period beginning on the date of its establishment unless—

(A) in the case of an advisory committee established by the President or an officer of the Federal Government, such advisory committee is renewed by the President or such officer by appropriate action prior to the end of such period; or

(B) in the case of an advisory committee established by an Act of Congress, its duration is otherwise provided for by law.

(b)(1) Upon the renewal of any advisory committee, such advisory committee shall file a charter in accordance with section 9(c).

(2) Any advisory committee established by an Act of Congress shall file a charter in accordance with such section upon the expiration of each successive two-year period following the date of enactment of the Act establishing such advisory committee.

(3) No advisory committee required under this subsection to file a charter shall take any action (other than preparation and filing of such charter) prior to the date on which such charter is filed.

(c) Any advisory committee which is renewed by the President or any officer of the Federal Government may be continued only for successive two-year periods by appropriate action taken by the President or such officer prior to the date on which such advisory committee would otherwise terminate.

### References in Text

Effective date of this Act, referred to in subsec. (a)(1), as meaning effective upon expiration of ninety days following enactment of Pub. L. 92-463 on Oct. 6, 1972, see section 15 of Pub. L. 92-463.

### Section Referred to in Other Sections

This section is referred to in section 8473 of this title; title 7 section 5005; title 15 section 4603; title 16 sections 410nn-3, 410oo-5, 410qq-2, 460ww-5, 1274; title 29 section 1142; title 33 section 2251; title 42 sections 218, 254j, 292b, 300j-5, 300v-3; title 49 App. section 1607c.

### § 15. Effective date

Except as provided in section 7(b), this Act shall become effective upon the expiration of ninety days following October 6, 1972.

## 52 Fed. Reg. 45926 (Dec. 2, 1987)

**GENERAL SERVICES ADMINISTRATION**

**41 CFR Part 101–6**

**[FPMR Amendment A–40]**

### Federal Advisory Committee Management

**AGENCY:** Office of Administration, GSA.

**ACTION:** Final rule.

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**SUMMARY:** This final rule provides administrative and interpretive guidelines and management controls for Federal agencies concerning the implementation of the Federal Advisory Committee Act, as amended (5 U.S.C., App.) (hereinafter "the Act"). In a previous issue of the Federal Register, GSA published an interim final rule on the management of Federal advisory committees and requested comments (48 FR 19324; April 28, 1983). Additional comments were requested through an advance notice of proposed rulemaking published in the Federal Register on February 13, 1987 (52 FR 4631). A new proposed rule, removing suggested limitations on the size of Federal advisory committees, eliminating requirements for the provision of updated committee membership data on a quarterly basis and restrictions on the compensation of committee members, and reflecting other actions to streamline compliance with the Act, was published in the Federal Register on May 19, 1987 (52 FR 18774), with a 90-day comment period ending on August 17. All comments received were considered in formulating this final rule which is intended to improve the management and use of Federal advisory committees in the Executive Branch of the Federal Government.

**EFFECTIVE DATE:** January 4, 1988.

**ADDRESSES:** General Services Administration, Committee Management Secretariat (CTM), Washington, DC 20405.

Copies of all comments received are available for public inspection in Room 7030 of the General Services Building, 18th and F Streets NW., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** James L. Dean, Director, Committee Management Secretariat, Office of Management Services, Office of Administration, General Services Administration, Washington, DC 20405 (202) 523–1343.

**SUPPLEMENTARY INFORMATION:**

### Background

GSA's authority for administering the Act is contained in section 7 of the Act and Executive Order 12024 (42 FR 61445, 3 CFR, 1977 Comp., p. 158). Under Executive Order 12024, the President delegated to the Administrator of General Services all of the functions vested in the President by the Act, as amended, except that the Annual Report to the Congress required by Section 6(c) shall be prepared by the Administrator for the President's consideration and transmittal to the Congress.

### Discussion of Comments

As stated above, GSA issued a proposed rule on the management of Federal advisory committees in the Federal Register and invited comments. Nineteen commenters responded. Seven commenters had no substantive recommendations and were fully supportive of the proposed rule. Twelve others offered suggestions for improving numerous sections and the disposition of these recommendations is addressed as follows:

#### *Clarify the Distinction Between Operational as Opposed to Advisory Committees*

Two commenters suggested that further guidance in the final rule was necessary to assist agencies in interpreting what constitutes primarily an operational committee as opposed to one which performs only advisory functions, in order to determine coverage under the Act. Accordingly, GSA has added language to § 101-6.1004(g) in the final rule which more fully describes what, in general, constitutes operational functions.

While the legislative history of the Act contains the concept for the exclusion of operational committees, there is no precise legal definition of operational committee in either the Act or its legislative history. GSA believes that operational functions to be performed by an advisory committee must be so authorized by law, since the making or implementation of Government decisions is normally reserved to Federal officials as opposed to advisory committees. Additionally, sections 2(b)(6) and 9(b) of the Act provide that, unless specifically provided by statute or Presidential directive, advisory committees may not make determinations or express policy in matters under their consideration. Given the additional language in this final rule, GSA believes that it will be easier for agencies to identify committees which perform primarily operational functions.

### *Provide for Coverage Under the Act When Certain Groups Provide Consensus or Recurrent Advice*

One commenter stated that the language in § 101–6.1004 (i) and (j) of the proposed rule was too tentative to specifically provide that acceptance of consensus advice or advice on a recurring basis from certain groups were determinants for coverage under the Act. GSA has accepted these suggestions and has strengthened the wording of these sections in the final rule.

Agencies are, in effect, cautioned that the Act would apply when an agency accepts the deliberations of a group as a source of *consensus* advice, when heretofore the agency had been obtaining the advice of attendees on an *individual* basis only. Also, when an agency *recurrently* uses a group at the group's request, as a source of advice on a preferential basis, exclusion of coverage under the Act may become questionable even if the group continues only to express its own views without further solicitations from Federal officials.

### *Strengthen the Provision for Excluding Coverage of So-Called Fact-Finding Subgroups*

Several commenters were of the opinion that so-called fact-finding subgroups should continue to be excluded from coverage under the Act. However, it was their general consensus that § 101–6.1004(k) of the proposed rule was less than clear in including both the members of an advisory committee and any of its subcommittee members in this exclusion. One commenter felt strongly that this exclusion should apply to all members of an advisory committee and its subcommittees, whether or not the subcommittee members are members of the parent committee. GSA agrees with this recommendation since it parallels the language and intent expressed in § 101–6.1007(b) (3) and (4) which clarify certain requirements applicable to subcommittees. GSA has reworded the definition of "Advisory Committee" in § 101.6.1003 of the final rule to follow more precisely the language in section 3(2) of the Act, and has been more consistent in the use of the term "subcommittee" in § 101–6.1004(k) and § 101–6.1007(b)(3) of the final rule.

Another commenter felt that the language in § 101–6.1004(k) was not strong enough to preclude fact-finding subgroups from preparing what ultimately becomes the advice and recommendations of the chartered advisory committee, as opposed to simply gathering information and analyzing facts for the committee. GSA has modified the language in this provision to clarify that the results of such fact-finding activities are to be subject to the deliberation of a chartered advisory committee, or a subcommittee when subsequently conducting a meeting under the Act.

### *Provide Additional Guidance on the Requirements Applicable to Subcommittees*

One commenter requested that the final rule provide additional guidance on the applicability of various requirements of the Act to subcommittees. Since the definition of "advisory committee" in section 3(2) of the Act specifically includes "* * * any subcommittee or other subgroup thereof * * *", GSA believes all requirements of advisory committees in the Act also apply to subcommittees. Furthermore, the Act itself contains no provisions for subcommittees which differ from those applicable to a full or parent committee. Absent more specific language in the Act, additional guidance by GSA which might serve to differentiate any requirements of subcommittees from those of advisory committees would be inconsistent with the Act.

### *Exclude From Coverage Under the Act Groups Convened by Agencies on an Ad Hoc Basis*

One commenter recommended that the final rule contain an exclusion from coverage under the Act for so-called *ad hoc* groups lacking formal organization, structure, or continuing existence; convened by an agency to obtain views on particular matters of immediate concern. GSA is of the opinion that such an exclusion is not appropriate since the Act itself neither defines nor specifically excludes such groups. In fact, section 6(c) of the Act, providing for the President's annual report to the Congress, requires a statement for each advisory committee, "* * * of whether it is an *ad hoc* or continuing body * * *". Accordingly, GSA has not accepted the recommendation to exclude *ad hoc* groups since GSA believes that the language of section 6(c) of the Act evidences the intent of the Congress that a group is not to be excluded from coverage merely because it is convened on an *ad hoc*, or temporary basis.

### *Provide That Agencies May Exercise Policy Decisions in Issuing Exclusions for One-Time Meetings*

In a comment directed toward GSA's position stated in the discussion of prior comments in the proposed rule (see 52 FR 18774, **SUPPLEMENTARY INFORMATION:**), a commenter suggested that the final rule should not preclude agencies from issuing an exclusion for one-time meetings. This commenter felt that GSA's opinion, that such an exclusion in the rule was not appropriate in view of the limited litigation history, should not bar agencies from issuing such exclusions. In fact, it was the opinion of this commenter that the absence of litigation history was not sufficient reason to limit management discretion.

GSA continues to believe that a one-time meeting exclusion in the final rule would be inconsistent with the Act, and does not intend to provide either a direct exclusion in § 101–6.1004 or provide that such a decision may be left to an agency, thereby implying GSA's support for such exclusions. Accordingly, GSA reiterates its opinion that in the absence of any judicial precedent to the contrary, meetings or groups which take place or meet only once should not be excluded from the Act's coverage solely on this basis.

### *Eliminate the Agency Requirement to Assess Duplication of Advisory Committees on a Governmentwide Basis*

Two commenters pointed out the impracticability of requiring an agency to assess duplication of effort of already existing committees on a Governmentwide basis as opposed to an individual agency basis. Both commenters further asserted that this Governmentwide role could be performed by GSA during its own review process subsequent to the receipt of the agency's proposal in accordance with § 101–6.1007(b) of the rule.

Since GSA is responsible for reviewing and maintaining data on all advisory committees in every agency pursuant to several provisions of the Act, GSA agrees that it can effectively perform this function. GSA can also provide agencies, on request, information on other agency committees relative to potential duplication of effort issues.

GSA has rewritten the language in § 101–6.1007 (a) and (b)(2)(ii) of the final rule to reflect this concept by providing that an agency only consider the functions of a proposed committee for duplication of existing committees in the *same* agency.

### *Include the Agency's Plan for Balanced Membership in Federal Register Notices and Charters*

One commenter suggested that an agency's plan to attain balanced membership for a proposed advisory committee, to be submitted in conjunction with the review required by § 101–6.1007(b) of the proposed rule, should be included in both the Federal Register notice of establishment and in the filed charter.

GSA has not adopted this suggestion for two reasons. First, the agency letter proposing the establishment of an advisory committee under general agency authority already contains this information, as specified by § 101–6.1007(b)(2)(iii) of the rule, and this letter would be a public record following the establishment of the advisory committee. Second, inclusion of this information in the Federal Register notice of establishment and the filed charter is not specifically required under sections 9 (a)(2) and (c) of the Act. For purposes of this comment, GSA has not altered § 101–6.1007(b)(1) or § 101–6.1015(a)(1) of the final rule.

### *Provide Additional Guidance on Balanced Representation and Selection of Members*

One commenter was concerned that the proposed rule did not contain sufficient guidance on balanced representation and the selection of members, and suggested that the final rule provide additional instructions for agencies to follow in these areas. GSA recognizes that the guidelines in the proposed rule are limited to the language of the Act. However, GSA believes that the provisions of section 5(c) of the Act are broad enough to allow agency discretion in determining advisory committee representation and membership relative to applicable statutes, Executive Orders, and the needs of the agency responsible for the committee. Accordingly, GSA will retain the proposed guidelines in the final rule based on the language of the Act.

### *Provide Revised Recordkeeping Requirements*

Two commenters, directly or indirectly, expressed concern over the recordkeeping requirements contained in the proposed rule. One commenter observed that it was not possible for the Committee Management Officer (CMO) to ensure compliance with sections 10(b), 12(a) and 13 of the Act, as required by § 101–6.1017. Section 10(b) of the Act requires that the records of an advisory committee *shall be* available at a single location at the advisory committee or the agency to which it reports during the committee's existence. This commenter suggested that GSA relax the requirement of § 101–6.1017.

Another commenter, taking a different view, complained of the haphazard approach by agencies to the public availability and retention of advisory committee records. This commenter recommended that the regulations be strengthened in these aspects.

**45928**

For the following reasons, GSA has determined not to adopt the specific suggestions of either commenter. First, section 8(b)(2) of the Act provides that the CMO shall "assemble and maintain the reports, records, and other papers of any such committee during its existence." When sections 8(b)(2) and 10(b) are read together, it is clear that the records of an advisory committee are to be available at a single location and it is the CMO who is responsible for ensuring that this is accomplished. GSA has therefore decided against relaxing the requirements of § 101–6.1017 in the final rule.

The commenter who expressed concern over the haphazard approach to recordkeeping suggested that the final rule should: (1) Require agencies to keep committee records available for a certain period of time after a committee has terminated, and (2) address the perceived unavailability of the deliberative process privilege under the fifth exemption of the Freedom of Information Act (FOIA) to advisory committee records. For the following reasons, GSA has not adopted these comments.

First, pursuant to the National Archives and Records Administration Act of 1984, as amended, Pub. L. 98–497, the Archivist of the United States is responsible for records management in the Federal Government, including the issuance of regulations and guidance for records retention and disposition, as well as the process for identifying records appropriate for transfer to the permanent Archives of the United States. Since the Federal Advisory Committee Act is silent on records disposition for advisory committees, we see no reason or basis for GSA to alter normal Governmentwide procedures in this area which are the responsibility of the Archivist of the United States. Second, the commenter suggested that the Government's settlement of the law suit involving records of the Attorney General's Commission on Pornography was a concession that the deliberative process privilege under the fifth exemption of FOIA does not apply to advisory committees. Since cases may be settled for a variety of reasons which do not involve a decision on the merits, GSA does not believe that the mere settlement of a matter in litigation is dispositive of the legal issues raised in the litigation. Accordingly, GSA has determined not to adopt this suggestion.

### *Provide Guidance to Agencies Concerning the Applicability of the Anti-Lobbying Statute and Hatch Act to Advisory Committee Members*

With respect to § 101–6.1033 of the proposed rule, one commenter stated that unless provided by statute, agencies should not compensate advisory committee members if they provide policy advice on proposals for legislation because this compensation would violate the anti-lobbying statute. (See 18 U.S.C. 1913). The same commenter also stated that GSA should direct agencies to ensure that any members of an advisory committee who are subject to the Hatch Act (5 U.S.C. 7321–7328) are aware of their obligations under that law.

For the following reasons, GSA has adopted neither suggestion. First, GSA does not believe that the traditional activities of an advisory committee fall within the scope of the activities which 18 U.S.C. 1913 was designed to protect against. Second, the Federal Advisory Committee Act itself does not reference the Hatch Act, and there is already a body of regulations on political activities by Federal employees which has been issued by the Office of Personnel Management, 5 CFR Part 733. Also, the Special Counsel of the Merit Systems Protection Board, who has responsibilities for investigation and administrative prosecution of alleged Hatch Act violations, issues advisory opinions on Hatch Act questions. GSA sees no need to issue regulations in this area when there are already regulations in place and an administrative mechanism available through agencies with greater responsibilities in this area than GSA.

### *Clarify the Procedures for Transmitting Follow-up Reports on Presidential Advisory Committee Recommendations*

One commenter requested clarification in § 101–6.1035(a) of the proposed rule on the procedures required for transmittal of follow-up reports to the Congress on the disposition of Presidential advisory committee recommendations, as required by section 6(b) of the Act. GSA has decided to retain the proposed language in the final rule without further modification at this time. GSA agrees that there has been some confusion as to whether the agency responsible for supporting the Presidential advisory committee, or GSA, should transmit the report. GSA intends to propose further guidance in a future revision to this final rule following more consultation with the affected agencies.

### Procedural and Administrative Comments

The final rule incorporates numerous technical and procedural recommendations made by several commenters, particularly in the following sections:

| Section | Modification |
|---|---|
| 101–6.1007(b)(2) | Requires proposed charter with agency letter. |
| 101–6.1007(d)(1) | Provides that date of charter filing constitutes date of establishment. |
| 101–6.1013 (a)(3) and (c)(3). | Eliminates proposed requirement for providing copies of filing letters to GSA by adding provision for filing dates on charters; makes related change to copies of Presidential advisory committee charters furnished to the Congress. |
| 101–6.1015 (a)(2) and (b)(1). | Provides for timely notices in the **Federal Register** on a calendar-day basis. |
| 101–6.1017 (a) and (d). | Adds requirements that membership lists and closed meeting determinations be included in records. |
| 101–6.1025(b) | Adds requirement from section 10(c) of the Act on the certification to the accuracy of minutes of meetings. |
| 101–6.1027(b) | Adds requirement to notify Secretariat when an agency head terminates a committee. |
| 101–6.1035(d) | Provides for location for filing copies of reports with the Library of Congress. |

Other sections were also amended or revised for clarity of intent, or corrected for errors in content and format.

These sections include:

| Section | Modification |
|---|---|
| 101–6.1002(d) | Changes citation of "the Act" to the Government in the Sunshine Act. |
| 101–6.1007(b)(2)(iii). | Clarifies provision for considering the selection of members with respect to attaining balance. |
| 101–6.1009 | Corrects title of section to preclude inadvertent exclusion of committees directed or authorized by law; or established by the President. |
| 101–6.1013(b) | Corrects heading of section to preclude inadvertent exclusion of committees authorized by law. |
| 101–6.1015(a)(1) | Clarifies provision that a **Federal Register** notice of establishment is not required for committees specifically directed by law or established by the President. |
| 101–6.1017 | Eliminates sentence concerning files to preclude misinterpretation. |
| 101–6.1019 | Clarifies the status and role of the Designated Federal Officer. |
| 101–6.1027(a)(3) | Specifies the means by which the President or an agency head terminates a committee. |
| 101–6.1029(a)(1) | Clarifies the process involving the rechartering of committees specifically directed by law whose duration extends beyond 2 years. |
| 101–6.1031(a) | Corrects heading of section to encompass committees authorized by law; specifies that the agency head is responsible for minor charter amendments. |
| 101–6.1031(b) | Specifies that the agency head retains final authority for amending certain charters. |

### Additional Instructions

Pursuant to section 7(d) of the Act, the guidelines contained in this final rule with respect to uniform fair rates of pay for comparable services for members, staffs and consultants of advisory committees have been established after consultation by the Administrator with the Director, Office of Personnel Management.

### Executive Order 12291

GSA has determined that this final rule is not a major rule for purposes of Executive Order 12291 of February 17, 1981, because it will not result in an annual effect on the economy of $100 million or more, will not cause a major increase in costs to consumers or others, and will not have significant adverse effects. GSA has based all administrative decisions on this final rule on adequate information concerning the need for and consequences of this final rule. GSA has also determined that the potential benefits to society from this final rule far outweigh the potential costs, has maximized the net benefits, and has chosen the alternative involving the least net cost to society.

### Regulatory Flexibility Act

These regulations are not subject to the regulatory flexibility analysis or other requirements of 5 U.S.C. 603 and 604.

**List of Subjects in 41 CFR Part 101–6**

Civil rights, Government property management, Grant programs, Intergovernmental relations, Surplus Government property, Relocation assistance, Real property acquisition, Federal advisory committees.

Accordingly, 41 CFR Part 101–6 is amended as follows:

## PART 101–6—MISCELLANEOUS REGULATIONS

1. The authority citation for 41 CFR Part 101–6 continues to read as follows:

**Authority:** Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c); sec. 7, 5 U.S.C., App.; and E.O. 12024, 3 CFR 1977 Comp., p. 158.

2. Subpart 101–6.10 is revised to read as follows:

### Subpart 101–6.10—Federal Advisory Committee Management

Sec.
101–6.1001 Scope.
101–6.1002 Policy.
101–6.1003 Definitions.
101–6.1004 Examples of advisory meetings or groups not covered by the Act or this subpart.
101–6.1005 Authorities for establishment of advisory committees.
101–6.1006 [Reserved]
101–6.1007 Agency procedures for establishing advisory committees.
101–6.1008 The role of GSA.
101–6.1009 Responsibilities of an agency head.
101–6.1010 [Reserved]
101–6.1011 Responsibilities of the chairperson of an independent Presidential advisory committee.
101–6.1012 [Reserved]
101–6.1013 Charter filing requirements.
101–6.1014 [Reserved]
101–6.1015 Advisory committee information which must be published in the Federal Register.
101–6.1016 [Reserved]
101–6.1017 Responsibilities of the agency Committee Management Officer.
101–6.1018 [Reserved]
101–6.1019 Duties of the Designated Federal Officer.
101–6.1020 [Reserved]
101–6.1021 Public participation in advisory committee meetings.
101–6.1022 [Reserved]

Sec.
101–6.1023 Procedures for closing an advisory committee meeting.
101–6.1024 [Reserved]
101–6.1025 Requirement for maintaining minutes of advisory committee meetings.
101–6.1026 [Reserved]
101–6.1027 Termination of advisory committees.
101–6.1028 [Reserved]
101–6.1029 Renewal and rechartering of advisory committees.
101–6.1030 [Reserved]
101–6.1031 Amendments to advisory committee charters.
101–6.1032 [Reserved]
101–6.1033 Compensation and expense reimbursement of advisory committee members, staffs and consultants.
101–6.1034 [Reserved]
101–6.1035 Reports required for advisory committees.

### § 101–6.1001 Scope.

(a) This subpart defines the policies, establish minimum requirements, and provide guidance to agency management for the establishment, operation, administration, and duration of advisory committees subject to the Federal Advisory Committee Act, as amended. Reporting requirements which keep the Congress and the public informed of the number, purpose, membership, activities, and cost of these advisory committees are also included.

(b) The Act and this subpart do not apply to advisory meetings or groups listed in § 101–6.1004.

### § 101–6.1002 Policy.

The policy to be followed by Federal departments, agencies, and commissions, consistent with the Federal Advisory Committee Act, as amended, is as follows:

(a) An advisory committee shall be established only when it is essential to the conduct of agency business. Decision criteria include whether committee deliberations will result in the creation or elimination of, or change in regulations, guidelines, or rules affecting agency business; whether the information to be obtained is already available through another advisory committee or source within the Federal Government; whether the committee will make recommendations resulting in significant improvements in service or reductions in cost; or whether the committee's recommendations will provide an important additional perspective or viewpoint impacting agency operations;

(b) An advisory committee shall be terminated whenever the stated objectives of the committee have been accomplished; the subject matter or work of the committee has become obsolete by the passing of time or the assumption of the committee's main functions by another entity within the Federal Government; or the agency determines that the cost of operation is excessive in relation to the benefits accruing to the Federal Government;

(c) An advisory committee shall be balanced in its membership in terms of the points of view represented and the functions to be performed; and

(d) An advisory committee shall be open to the public in its meetings except in those circumstances where a closed meeting shall be determined proper and consistent with the provisions in the Government in the Sunshine Act, 5 U.S.C. 552(b).

### § 101-6.1003 Definitions.

"Act" means the Federal Advisory Committee Act, as amended, 5 U.S.C., App.

"Administrator" means the Administrator of General Services.

"Advisory committee" subject to the Act means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof, which is established by statute, or established or utilized by the President or any agency official for the purpose of obtaining advice or recommendations on issues or policies which are within the scope of his or her responsibilities.

"Agency" has the same meaning as in section 551(1) of Title 5 of the United States Code.

"Committee Management Secretariat" ("Secretariat"), established pursuant to the Act is responsible for all matters relating to advisory committees, and carries out the Administrator's responsibilities under the Act and Executive Order 12024.

"Committee member" means an individual who serves by appointment on an advisory committee and has the full right and obligation to participate in the activities of the committee, including voting on committee recommendations.

"Presidential advisory committee" means any advisory committee which advises the President. It may be established by the President or by the Congress, or used by the President in the interest of obtaining advice or recommendations for the President. "Independent Presidential advisory committee" means any Presidential advisory committee not assigned by the President, or the President's delegate, or by the Congress in law, to an agency for administrative and other support and for which the Administrator of General Services may provide administrative and other support on a reimbursable basis.

"Staff member" means any individual who serves in a support capacity to an advisory committee.

"Utilized" (or "used"), as referenced in the definition of "Advisory committee" in this section, means a committee or other group composed in whole or in part of other than full-time officers or employees of the Federal Government with an established existence outside the agency seeking its advice which the President or agency official(s) adopts, such as through institutional arrangements, as a preferred source from which to obtain advice or recommendations on a specific issue or policy within the scope of his or her responsibilities in the same manner as that individual would obtain advice or recommendations from an established advisory committee.

### § 101-6.1004 Examples of advisory meetings or groups not covered by the Act or this subpart.

The following are examples of advisory meetings or groups not covered by the Act or this subpart;

(a) Any committee composed wholly of full-time officers or employees of the Federal Government;

(b) Any advisory committee specifically exempted by an Act of Congress;

(c) Any advisory committee established or utilized by the Central Intelligence Agency;

(d) Any advisory committee established or utilized by the Federal Reserve System;

(e) The Advisory Committee on Intergovernmental Relations;

(f) Any local civic group whose primary function is that of rendering a public service with respect to a Federal program, or any State or local committee, council, board, commission, or similar group established to advise or make recommendations to State or local officials or agencies;

(g) Any committee which is established to perform primarily operational as opposed to advisory functions. Operational functions are those specifically provided by law, such as making or implementing Government decisions or policy. An operational committee may be covered by the Act if it becomes primarily advisory in nature. It is the responsibility of the administering agency to determine whether such a committee is primarily operational. If so, it would not fall under the requirements of the Act and this Subpart, but would continue to be regulated under relevant laws, subject to the direction of the President and the review of the appropriate legislative committees;

(h) Any meeting initiated by the President or one or more Federal official(s) for the purpose of obtaining advice or recommendations from one individual;

(i) Any meeting initiated by a Federal official(s) with more than one individual for the purpose of obtaining the advice of individual attendees and not for the purpose of utilizing the group to obtain consensus advice or recommendations. However, agencies should be aware that such a group would be covered by the Act when an agency accepts the group's deliberations as a source of consensus advice or recommendations;

(j) Any meeting initiated by a group with the President or one or more Federal official(s) for the purpose of expressing the group's view, provided that the President or Federal official(s) does not use the group recurrently as a preferred source of advice or recommendations;

(k) Meetings of two or more advisory committee or subcommittee members convened solely to gather information or conduct research for a chartered advisory committee, to analyze relevant issues and facts, or to draft proposed position papers for deliberation by the advisory committee or a subcommittee of the advisory committee; or

(l) Any meeting with a group initiated by the President or one or more Federal official(s) for the purpose of exchanging facts or information.

### § 101–6.1005 Authorities for establishment of advisory committees.

An advisory committee may be established in one of four ways:

(a) By law where the Congress specifically directs the President or an agency to establish it;

(b) By law where the Congress authorizes but does not direct the President or an agency to establish it. In this instance, the responsible agency head shall follow the procedures provided in § 101–6.1007;

(c) By the President by Executive Order; or

(d) By an agency under general agency authority in Title 5 of the United States Code or under other general agency-authorizing law. In this instance, an agency head shall follow the procedures provided in § 101–6.1007.

### § 101–6.1006 [Reserved]

### § 101–6.1007 Agency procedures for establishing advisory committees.

(a) When an agency head decides that it is necessary to establish a committee, the agency must consider the functions of similar committees in the same agency before submitting a consultation to GSA to ensure that no duplication of effort will occur.

(b) In establishing or utilizing an advisory committee, the head of an agency or designee shall comply with the Act and this subpart, and shall:

(1) Prepare a proposed charter for the committee which includes the information listed in section 9(c) of the Act; and

(2) Submit a letter and the proposed charter to the Secretariat proposing to establish or use, reestablish, or renew an advisory committee. The letter shall include the following information:

(i) An explanation of why the committee is essential to the conduct of agency business and in the public interest;

(ii) An explanation of why the committee's functions cannot be performed by the agency, another existing advisory committee of the agency, or other means such as a public hearing; and

(iii) A description of the agency's plan to attain balanced membership. For purposes of attaining balance, agencies shall consider for membership interested persons and groups with professional or personal qualifications or experience to contribute to the functions and tasks to be performed. This should be construed neither to limit the participation, nor compel the selection of any particular individual or group to obtain divergent points of view that are relevant to the business of the advisory committee.

(3) Subcommittees that do not function independently of the full or parent advisory committee need not follow the requirements of paragraphs (b)(1) and (b)(2) of this section. However, they are subject to all other requirements of the Act.

**45931**

(4) The requirements of paragraphs (b)(1) and (b)(2) of this section shall apply for any subcommittee of a chartered advisory committee, whether its members are drawn in whole or in part from the full or parent advisory committee, which functions independently of the parent advisory committee such as by making recommendations directly to the agency rather than for consideration by the chartered advisory committee.

(c) The Secretariat will review the proposal and notify the agency of GSA's views within 15 calendar days of receipt, if possible. The agency head retains final authority for establishing a particular advisory committee.

(d) The agency shall notify the Secretariat in writing that either:

(1) The advisory committee is being established. The filing of the advisory committee charter as specified in § 101–6.1013 shall be considered appropriate written notification in this instance. The date of filing constitutes the date of establishment or renewal. The agency head shall then comply with the provisions of § 101–6.1009 for an established advisory committee; or

(2) The advisory committee is not being established. In this instance, the agency shall also advise the Secretariat if the agency head intends to take any further action with respect to the proposed advisory committee.

### § 101–6.1008 The role of GSA.

(a) The functions under section 7 of the Act will be performed for the Administrator by the Secretariat. The Secretariat assists the Administrator in prescribing administrative guidelines and management controls for advisory committees, and assists other agencies in implementing and interpreting these guidelines. In exercising internal controls over the management and supervision of the operations and procedures vested in each agency by section 8(b) of the Act and by § 101–6.1009 and § 101–6.1017 of this rule, agencies shall conform to the guidelines prescribed by GSA.

(b) The Secretariat may request comments from agencies on management guidelines and policy issues of broad interagency interest or application to the Federal advisory committee program.

(c) In advance of issuing informal guidelines, nonstatutory reporting requirements, and administrative procedures such as report formats or automation, the Secretariat shall request formal or informal comments from agency Committee Management Officers.

**§ 101-6.1009 Responsibilities of any agency head.**

The head of each agency that uses one or more advisory committees shall ensure:

(a) Compliance with the Act and this subpart;

(b) Issuance of administrative guidelines and management controls which apply to all advisory committees established or used by the agency;

(c) Designation of a Committee Management Officer who shall carry out the functions specified in section 8(b) of the Act;

(d) Provision of a written determination stating the reasons for closing any advisory committee meeting to the public;

(e) A review, at least annually, of the need to continue each existing advisory committees, consistent with the public interest and the purpose of functions of each committee;

(f) Rates of pay are justified and levels of agency support are adequate;

(g) The appointment of a Designated Federal Officer for each advisory committee and its subcommittees;

(h) The opportunity for reasonable public participation in advisory committee activities; and

(i) That the number of committee members is limited to the fewest necessary to accomplish committee objectives.

**§ 101-6.1010 [Reserved]**

**§ 101-6.1011 Responsibilities of the chairperson of an independent Presidential advisory committee.**

The chairperson of an independent Presidential advisory committee shall comply with the Act and this subpart and shall:

(a) Consult with the Administrator concerning the role of the Designated Federal Officer and Committee Management Officer; and

(b) Fulfill the responsibilities of an agency head as specified in paragraphs (d) and (h) of § 101-6.1009.

**§ 101-6.1012 [Reserved]**

**§ 101-6.1013 Charter filing requirements.**

No advisory committee may operate, meet, or take any action until its charter has been filed as follows:

(a) *Advisory committee established, used, reestablished, or renewed by an agency.* The agency head shall file—

(1) The charter with the standing committees of the Senate and the House of Representatives having legislative jurisdiction of the agency;

(2) A copy of the filed charter with the Library of Congress, Exchange and Gift Division, Federal Documents Section, Federal Advisory Committee Desk, Washington, DC 20540; and

(3) A copy of the charter indicating the Congressional filing date, with the Secretariat.

(b) *Advisory committee specifically directed by law or authorized by law.* Procedures are the same as in paragraph (a) of this section.

(c) *Presidential advisory committee.* When either the President or the Congress establishes an advisory committee that advises the President, the responsible agency head or, in the case of an independent Presidential advisory committee, the President's designee shall file—

(1) The charter with the Secretariat;

(2) A copy of the filed charter with the Library of Congress; and

(3) If specifically directed by law, a copy of the charter indicating its date of filing with the Secretariat, with the standing committees on the Senate and the House of Representatives having legislative jurisdiction of the agency or the independent Presidential advisory committee.

**§ 101-6.1014 [Reserved]**

**§ 101-6.1015 Advisory committee information which must be published in the Federal Register.**

(a) *Committee establishment, reestablishment, or renewal.* (1) A notice in the Federal Register is required when an advisory committee, except a committee specifically directed by law or established by the President by Executive Order, is established, used, reestablished, or renewed. Upon receiving notification of the completed review from the Secretariat in accordance with paragraph (c) of § 101–

6.1007, the agency shall publish a notice in the Federal Register that the committee is being established, used, reestablished, or renewed. For a new committee, such notice shall also include statements describing the nature and purpose of the committee and that the committee is necessary and in the public interest.

(2) Establishment and reestablishment notices shall appear at least 15 calendar days before the committee charter is filed, except that the Secretariat may approve less than 15 days when requested by the agency for good cause. The 15-day advance notice requirement does not apply to committee renewals, notices of which may be published concurrently with the filing of the charter.

(b) *Committee meetings.* (1) The agency or an independent Presidential advisory committee shall publish at least 15 calendar days prior to an advisory committee meeting a notice in the Federal Register, which includes:

**45932**

(i) The exact name of the advisory committee as chartered;

(ii) The time, date, place, and purpose of the meeting;

(iii) A summary of the agenda; and

(iv) A statement whether all or part of the meeting is open to the public or closed, and if closed, the reasons why, citing the specific exemptions of the Government in the Sunshine Act (5 U.S.C. 552(b)) as the basis for closure.

(2) In exceptional circumstances, the agency or an independent Presidential advisory committee may give less than 15 days notice, provided that the reasons for doing so are included in the committee meeting notice published in the Federal Register.

### § 101–6.1016. [Reserved]

### § 101–6.1017 Responsibilities of the agency Committee Management Officer.

In addition to implementing the provisions of section 8(b) of the Act, the Committee Management Officer will carry out all responsibilities delegated by the agency head. The Committee Management Officer should also ensure that section 10(b), 12(a) and 13 of the Act are implemented by the agency to provide for appropriate recordkeeping. Records include, but are not limited to:

(a) A set of approved charters and membership lists for each advisory committee;

(b) Copies of the agency's portion of the Annual Report of Federal Advisory Committees required by paragraph (b) of § 101–6.1035;

(c) Agency guidelines on committee management operations and procedures as maintained and updated; and

(d) Agency determinations to close advisory committee meetings as required by paragraph (c) of § 101–6.1023.

### § 101–6.1018 [Reserved]

### § 101–6.1019 Duties of the Designated Federal Officer.

The agency head or, in the case of an independent Presidential advisory committee, the Administrator shall designate a Federal officer or employee, who may be either full-time or permanent part-time, to be the Designated Federal Officer for each advisory committee and its subcommittees, who:

(a) Must approve or call the meeting of the advisory committee;

(b) Must approve the agenda;

(c) Must attend the meetings;

(d) Shall adjourn the meetings when such adjournment is in the public interest; and

(e) Chairs the meeting when so directed by the agency head.

(f) The requirement in paragraph (b) of this section does not apply to a Presidential advisory committee.

### § 101–6.1020 [Reserved]

### § 101–6.1021 Public participation in advisory committee meetings.

The agency head, or the chairperson of an independent Presidential advisory committee, shall ensure that—

(a) Each advisory committee meeting is held at a reasonable time and in a place reasonably accessible to the public;

(b) The meeting room size is sufficient to accommodate advisory committee members, committee or agency staff, and interested members of the public;

(c) Any member of the public is permitted to file a written statement with the advisory committee; and

(d) Any member of the public may speak at the advisory committee meeting if the agency's guidelines so permit.

**§ 101–6.1022 [Reserved]**

**§ 101–6.1023 Procedures for closing an advisory committee meeting.**

(a) To close all or part of a meeting, an advisory committee shall submit a request to the agency head or, in the case of an independent Presidential advisory committee, the Administrator, citing the specific provisions of the Government in the Sunshine Act (5 U.S.C. 552(b)) which justify the closure. The request shall provide the agency head or the Administrator sufficient time to review the matter in order to make a determination prior to publication of the meeting notice required by § 101–6.1015(b).

(b) The general counsel of the agency or, in the case of an independent Presidential advisory committee, the general counsel of the General Services Administration should review all requests to close meetings.

(c) If the agency head or, in the case of an independent Presidential advisory committee, the Administrator agrees that the request is consistent with the provisions in the Government in the Sunshine Act and the Federal Advisory Committee Act, he or she shall issue a determination that all or part of the meeting be closed.

(d) The agency head, or the chairperson of an independent Presidential advisory committee, shall:

(1) Make a copy of the determination available to the public upon request; and

(2) State the reasons why all or part of the meeting is closed, citing the specific exemptions used from the Government in the Sunshine Act in the meeting notice published in the Federal Register.

**§ 101–6.1024 [Reserved]**

**§ 101–6.1025 Requirement for maintaining minutes of advisory committee meetings.**

(a) The agency head or, in the case of an independent Presidential advisory committee, the chairperson shall ensure that detailed minutes of each advisory committee meeting are kept. The minutes must include:

(1) Time, date, and place;

(2) A list of the following persons who were present:

(i) Advisory committee members and staff;

(ii) Agency employees; and

(iii) Members of the public who presented oral or written statements;

(3) An estimated number of other members of the public present;

(4) An accurate description of each matter discussed and the resolution, if any, made by the committee of such matter; and

(5) Copies of each report or other document received, issued, or approved by the committee.

(b) The chairperson of each advisory committee shall certify to the accuracy of all minutes of advisory committee meetings.

**§ 101–6.1026 [Reserved]**

**§ 101–6.1027 Termination of advisory committees.**

(a) Any advisory committee shall automatically terminate not later than 2 years after it is established, reestablished, or renewed, unless:

(1) Its duration is otherwise provided for by law;

(2) The President or agency head renews it prior to the end of such period; or

(3) The President or agency head terminates it before that time by revoking or abolishing its establishment authority.

(b) If an agency head terminates an advisory committee, the agency shall notify the Secretariat of the effective date of termination.

**§ 101–6.1028 [Reserved]**

### § 101–6.1029 Renewal and rechartering of advisory committees.

(a) Advisory committees specifically directed by law:

(1) Whose duration extends beyond 2 years shall require rechartering by the filing of a new charter every 2 years after the date of enactment of the law establishing the committee. If a new charter is not filed, the committee is not terminated, but may not meet or take any action.

(2) Which would terminate under the provisions of section 14 of the Act, and for which renewal would require reauthorization by law, may be reestablished by an agency provided that the agency complies under general agency authority with the provisions of § 101–6.1007.

(b) Advisory committees established by the President may be renewed by appropriate action of the President and the filing of a new charter.

(c) Advisory committees authorized by law or established or used by an agency may be renewed, provided that at least 30 but not more than 60 days before the committee terminates, an agency head who intends to renew a committee complies with the provisions of § 101–6.1007.

### § 101–6.1030 [Reserved]

### § 101–6.1031 Amendments to advisory committee charters.

(a) *Committees specifically directed by law or authorized by law; or established by the President.* The agency head shall be responsible for ensuring that any minor technical changes made to current charters are consistent with the relevant statute or Executive Order. When the Congress by law, or the President by Executive Order, changes the authorizing language which has been the basis for establishing an advisory committee, the agency head, or the chairperson of an independent Presidential advisory committee, shall:

(1) Amend those sections of the current charter affected by the new law or Executive Order; and

(2) File the amended charter as specified in § 101–6.1013.

(b) *Committees established or used by an agency.* The charter of an advisory committee established under general agency authority may be amended when an agency head determines that the existing charter no longer accurately reflects the objectives or functions of the committee. Changes may be minor, such as revising the name of the advisory committee, or modifying the estimated number or frequency of meetings. Changes may also be major such as those dealing with the objectives or composition of the committee. The agency head retains final authority for amending the charter of an advisory committee. Amending any existing advisory committee charter does not constitute renewal of the committee under § 101–6.1029.

(1) To make a minor amendment to a committee charter, an agency shall:

(i) Amend the charter language as necessary, and

(ii) File the amended charter as specified in § 101–6.1013.

(2) To make a major amendment to a committee charter, an agency shall:

(i) Amend the charter language as necessary;

(ii) Submit the proposed amended charter with a letter to the Secretariat requesting GSA's views on the amended language, along with an explanation of the purpose of the changes and why they are necessary. The Secretariat will review the proposed changes and notify the agency of GSA's views within 15 calendar days of the request, if possible; and

(iii) File the amended charter as specified in § 101–6.1013.

### § 101–6.1032 [Reserved]

### § 101–6.1033 Compensation and expense reimbursement of advisory committee members, staffs and consultants.

(a) *Uniform pay guidelines for members of an advisory committee.* Nothing in this subpart shall require an agency head to provide compensation, unless otherwise provided by law, to a member of an advisory committee. However, when compensation is deemed appropriate by an agency, it shall fix the pay of the members of an advisory committee to the daily equivalent of a rate of the General Schedule in 5 U.S.C. 5332 unless the members are appointed as consultants and compensated under 5 U.S.C. 3109. In determining an appropriate rate of pay for the members, an agency shall give consideration to the significance, scope, and technical complexity of the matters with which the advisory committee is concerned and the qualifications required of the members of the advisory committee. An agency may not fix the pay of the members of an advisory committee at a rate higher than the daily equivalent of the maximum rate for a GS–15 under the General Schedule, unless a higher rate is mandated by statute, or the head of the agency has personally determined that a higher rate of pay under the General Schedule is justified and necessary. Such a determination must be reviewed by the head of the agency annually. Under this subpart, an agency may not fix the pay of the members of an advisory committee at a rate of pay higher than the daily equivalent of a rate for a GS–18, as provided in 5 U.S.C. 5332.

(b) *Pay for staff members of an advisory committee.* An agency may fix the pay of each advisory committee staff member at a rate of the General Schedule in which the Staff member's position would appropriately be placed (5 U.S.C. Chapter 51). An agency may not fix the pay of a staff member at a rate higher than the daily equivalent of the maximum rate for GS–15, unless the agency head has determined that under the General Schedule the staff member's position would appropriately be placed at a grade higher than GS–15. This determination must be reviewed annually by the agency head.

(1) In establishing rates of compensation, the agency head shall comply with any applicable statutes, regulations, Executive Orders, and administrative guidelines.

(2) A staff member who is a Federal employee shall serve with the knowledge of the Designated Federal Officer and the approval of the employee's direct supervisor. If a non-Federal employee, the staff member shall be appointed in accordance with applicable agency procedures, following consultation with the advisory committee.

(c) *Pay for consultants to an advisory committee.* An agency shall fix the pay of a consultant to an advisory committee after giving consideration to the qualifications required of the consultant and the significance, scope, and technical complexity of the work. The compensation may not exceed the maximum rate of pay authorized by 5 U.S.C. 3109, and shall be in accordance with any applicable statutes, regulations, Executive Orders and administrative guidelines.

(d) *Gratuitous services.* In the absence of any special limitations applicable to a specific agency, nothing in this subpart shall prevent an agency from accepting the gratuitous services of an advisory committee member, staff member, or consultant who agrees in advance to serve without compensation.

(e) *Travel expenses.* Advisory committee members and staff members, while engaged in the performance of their duties away from their homes or regular places of business, may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of Title 5, United States Code, for persons employed intermittently in the Government service.

(f) *Services for handicapped members.* While performing advisory committee duties, an advisory committee member who is blind or deaf or who qualifies as a handicapped individual may be provided services by a personal assistant for handicapped employees if the member:

(1) Qualifies as a handicapped individual as defined by section 501 of

**45934**

the Rehabilitation Act of 1973 (29 U.S.C. 794); and

(2) Does not otherwise qualify for assistance under 5 U.S.C. 3102 by reason of being an employee of an agency.

(g) *Exclusions.* (1) Nothing in this section shall prevent any person who (without regard to his or her service with an advisory committee) is a full-time Federal employee from receiving compensation at a rate which he or she otherwise would be compensated as a full-time Federal employee.

(2) Nothing in this section shall prevent any person who immediately before his or her service with an advisory committee was a full-time Federal employee from receiving compensation at the rate at which he or she was compensated as a full-time Federal employee.

(3) Nothing in this section shall affect a rate of pay or a limitation on a rate of pay that is specifically established by law or a rate of pay established under the General Schedule classification and pay system in chapter 51 and chapter 53 of Title 5, United States Code.

### § 101-6.1034 [Reserved]

### § 101-6.1035 Reports required for advisory committees.

(a) Within one year after a Presidential advisory committee has submitted a public report to the President, the President or his delegate will prepare a follow-up report to the Congress detailing the disposition of the committee's recommendations in accordance with section 6(b) of the Act;

(b) The President's annual report to the Congress shall be prepared by GSA based on reports filed on a fiscal year basis by each agency consistent with the information specified in section 6(c) of the Act. Reports from agencies shall be consistent with instructions provided annually by the Secretariat. This report has been cleared in accordance with FIRMR 201–45.6 in 41 CFR Chapter 201 and assigned interagency report control number 0304–GSA–XX.

(c) In accordance with section 10(d) of the Act, advisory committees holding closed meetings shall issue reports at least annually, setting forth a summary of activities consistent with the policy of Section 552(b) of Title 5, United States Code.

(d) Subject to section 552 of Title 5, United States Code, eight copies of each report made by an advisory committee, including any report on closed meetings as specified in paragraph (c) of this section, and, where appropriate, background papers prepared by consultants, shall be filed with the Library of Congress as required by section 13 of the Act, for public inspection and use at the location specified in paragraph (a)(2) of § 101-6.1013.

Dated: November 24, 1987.

**T.C. Golden,**

*Administrator of General Services.*

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# CHAPTER 4 - THE CONVENING PROCESS

The process of convening a regulatory negotiation includes evaluating the feasibility of negotiating a rule, designing the structure of a negotiating committee, and identifying a preliminary set of issues to be negotiated. An agency contemplating negotiated rulemaking will usually choose one or more "convenors" -- persons or organizations that will carry out these tasks and discuss the results with agency officials. In addition, it may be necessary or advisable at various times in the convening process for agency staff to contact relevant congressional staff, Office of Management and Budget staff, and staff of other agencies to discuss with them the possibility of negotiating the rule.

The convenor must first identify all interests that may be affected by the rule. The term "interest" refers to a grouping of parties who are likely to be affected similarly by the regulation or who appear to have similar perspectives on the subject matter of the contemplated rule. The convenor normally proceeds by contacting the parties, including the agency, and by interviewing them in an effort to identify all interests, to define the issues that need to be addressed in the rulemaking, and to explore whether it is possible to obtain commitments to negotiate from representative parties and agency personnel. The convenor attempts to assemble a balanced committee willing and able to work toward the goal of consensus on a rule that is within the agency's statutory authority and which addresses the issues that cause the agency to consider adopting a rule. (See 5 U.S.C. §563(b))

The importance of the convening process cannot be overemphasized. An agency should not undertake a negotiated rulemaking proceeding without first giving adequate attention to the issues and steps noted above. This does not mean that the agency must always hire an outside consultant and conduct an elaborate study. The convenor, however selected, will ordinarily take as a starting point the information and experience already in possession of the agency. The essence of the convening process, however, is to talk to potential parties about both the issues and the process. Through these contacts, judgments can be made about which interests must participate, who can adequately represent those interests, their willingness to participate, and the prospects for success. In some instances, of course, the convening process may result in a decision not to use reg-neg, or perhaps to use some other approach to developing a consensus. Agency experience indicates that skipping or minimizing this inquiry may substantially reduce the likelihood of achieving the benefits of negotiated rulemaking.

## Selecting a Convenor

Convenors may be agency employees, employees of other agencies, or private sector contractors skilled in bringing parties together to negotiate. Normally, a convenor should be neutral with respect to the substantive issues. This ordinarily implies use of either a government employee loaned from another program or agency or use of a private sector contractor.

A convenor who has no current responsibility in connection with the proposed rulemaking is more likely to be able to establish rapport with prospective parties and to obtain more complete information than could agency rulemaking staff. Parties may be more frank with such a convenor about whether they are interested in negotiating or about what issues are important and why. The fresh perspective brought to the rulemaking problem by an outsider may also be valuable in identifying parties or interests who have not been involved previously. The result may be a better evaluation of the rule's feasibility for negotiation.

In some cases, where the rulemaking is not essentially an adversarial process, it may be acceptable to choose as convenor a person on the agency's rulemaking staff. However, this person would probably not be able to function as a mediator during the negotiation stage of the proceeding. It may make sense to use agency rulemaking staff for convening where there is a good working relationship with the affected parties. Additionally, staff's knowledge of the subject may lead to a more detailed discussion of which issues should be open to negotiation. Use of rulemaking staff can also save contract dollars for the agency, though this choice may divert badly needed staff resources from preparation of drafts or background information needed to begin negotiations.

A team of convenors may be appropriate for a rule with many complex issues or dozens of potentially affected parties. The team can be composed of a mix of rulemaking staff, other staff, and private sector contractors.

Qualifications are important. To be a good convenor, a person should have investigative talents, organizational skills, an ability to understand and communicate complex issues, and excellent listening skills. A background in conflict analysis or dispute resolution can be helpful in evaluating the probability of reaching consensus.

## Steps in the Convening Process

An agency has made the initial judgment that a rule may benefit from negotiation and has selected a convenor. What does the convenor do?

Representation of all affected interests in the negotiation is critical if the rule developed is to receive widespread support. The first step is to put together an initial list of potentially affected parties or interests. This is done by talking with the agency staff involved in this rulemaking and in other rulemaking proceedings that have involved similar issues, and by looking at the records of any such proceedings. The statute under which the rule is to be promulgated may specify certain interests that must be contacted. The legislative history may provide additional useful information.

It is helpful for the convenor to prepare a summary describing the contemplated rule and the reg-neg process, and to develop a list of assessment questions for use in interviewing parties. The convenor then makes contact with parties who might be able to represent each of the identified interests. These initial interviews are crucial in gathering information about the parties, the nature of their interest in the rule, and the scope of the issues. The interviews also serve as an educational tool on the negotiated rulemaking process, assisting potential parties to identify and resolve their concerns about the process and to determine whether it is in their interest to participate.

It is particularly important that potential parties acquire some understanding of the implications of the term "consensus" before agreeing to participate. (See the discussion of "consensus" in chapter 6.) Addressing this issue, Philip J. Harter has said:

> "[Consensus] ranges in meaning from a simple majority vote, to general agreement (meaning no substantial disagreement), on to unanimity. A workable approach has been . . . that, unless the parties agree to some other definition at the outset, each interest concurs in the result. This definition does not require each

> individual to agree, nor does it require that each interest support the outcome affirmatively. It does mean that the participants agree not to challenge the proposed or final rule if consistent with the [committee's] recommendation.
>
> "This definition provides that each interest when viewed as a whole has the power to veto the outcome. That preservation of power is critical in securing the willingness of interests to participate. If an interest felt that it could be outvoted in the discussions, it could reasonably believe it would be better off in the more formal, structured process, and it would not want to negotiate directly." (Testimony of Philip J. Harter on S. 1504, before the Senate Committee on Governmental Affairs, May 13, 1988.)

During the interviews, the convenor should explore possible obstacles to the negotiations such as:

- issues of fundamental values that cannot be compromised,
- unwillingness to participate by one or more key parties,
- disputes over factual information,
- issues too numerous or too complex to negotiate, or
- too many parties.

The convenor should make an effort to explore with the parties and the agency whether it is possible to structure the negotiating committee or the negotiations so as to minimize these obstacles. They may also discuss a tentative set of ground rules for the negotiations. Finally, the convenor should use the interviews as a tool for discovering any additional interests that might be affected by the rule and parties who might be suitable representatives of those interests. The interviews usually become an iterative process, which will eventually identify the parties affected by the rule. Agencies should recognize that a thorough convening effort is essential for the success of the reg-neg process, and should allow sufficient time in projecting their rulemaking schedules.

When the interviews have been completed, the convenor should summarize the results and recommend to agency management whether to proceed with the negotiations and, if so, who should participate. The convenor should also identify any additional parties who ought to be kept informed about the process. In practice, it appears that the maximum number of parties for which the process can be kept manageable is approximately 25. (Agencies conducting reg-negs have found 20 to 25 to be manageable, and this experience supersedes the Administrative Conference's initial estimate of a maximum of 15.) The Reg-Neg Act specifies a limit of 25, but permits a larger number if the agency head determines a larger committee to be necessary. (5 U.S.C. §565(b)) If there are more than 25 interests or interest groups, the convenor can explore whether it is possible to aggregate similar or related interests, either to form a coalition or merely to have a common spokesman, so that the number of negotiators actually sitting at the table is not unwieldy but all affected interests are adequately represented. In such instances, it is important for the negotiator to keep in close contact with each of the differing interests represented. In some cases, it may even be necessary to have the assistance of a mediator to deal with differences among parties represented by a single negotiator.

The convenor should also discuss with agency management the issues the parties wish to negotiate, the issues the parties will not or cannot negotiate, any obstacles that must be overcome and potential solutions, and a proposed design for the negotiation process itself. The agency may want the convenor to report, as well, to the parties. Informing the parties of the results of the convening effort can help establish a positive atmosphere that will be valuable if the agency decides to proceed with negotiations.

Both the agency and the convenor should be aware of an option that may sometimes arise. The subject matter of the proposed regulation may be within the jurisdiction of an existing committee of a non-governmental standards-writing organization such as the American National Standards Institute, the American Society for Testing and Materials, or the National Fire Protection Association. Voluntary consensus standards organizations such as these have procedures intended to ensure the fair representation of affected interests and a process for determining whether a proposed standard actually reflects a consensus among them. If such a committee exists and appears to enjoy the support and confidence of the affected interests, the convenor should consider recommending to the agency that negotiations be conducted under the auspices of that committee instead of establishing an entirely new framework for negotiations. (See Administrative Conference Recommendation 78-4, 1 CFR §305.78-4; see also Recommendation 82-4, par. 6, in the appendix to chapter 1.)

## The Decision to Proceed

Agency management then must decide whether to proceed with negotiations on the proposed issues. This decision requires careful consideration of the appropriateness -- both substantive and procedural -- of negotiating the suggested issues. (On procedural questions, see Recommendations 82-4 and 85-5 in the appendix to chapter 1, and also the discussion in chapter 2.) It may be appropriate for the agency to make further use of the convenor at this point. For example, if the agency does not want to negotiate particular issues identified by the convenor, it may be helpful for the convenor to contact the parties again to confirm whether they would still be interested in participating if a certain issue is not "on the table."

## Final Convening Phase

If the agency decides to proceed with the reg-neg, the convenor should now contact each party and obtain a more formal commitment to participate in the negotiation. The participants must, of course, be willing to negotiate in good faith to draft a proposed rule. Each party will select its own actual representative (and an alternate, if appropriate). Parties should be encouraged to choose negotiators who have knowledge of the subject matter and, if possible, experience in policy deliberations. The convenor or agency staff may be able to assist parties in finding suitable individuals. The representatives chosen should be able to speak for their constituencies and should be able to accept an agreement on their behalf in the event that consensus is reached. (See chapter 6 for discussion of the meaning of consensus.)

Parties and their representatives must understand that they are responsible for actively communicating information to and from their constituents during the negotiations. Exchange of data, experience, and the needs of the various interests will help the negotiators to craft creative solutions to problems and will foster a climate for achieving consensus. As the negotiations proceed -- and especially if consensus is reached -- it will be important for the negotiators to explain to their constituents the nature of the proposal and the value of supporting the agreement.

The Negotiated Rulemaking Act requires the agency to publish a notice in the Federal Register and, as appropriate, in trade or other specialized publications, announcing its intent to conduct a negotiated rulemaking and requesting comments on the proposal. (5

U.S.C. §564) The notice must describe the subject and scope of the rule and the issues to be considered. It should list the interests likely to be significantly affected, the persons proposed to represent those interests, and the agency's own representative. The notice should contain a proposed agenda and schedule for completing the committee's work, a description of the administrative support and technical assistance that the agency will furnish. Finally, the notice must provide a period of at least 30 days in which persons who believe their interests will not be adequately represented may apply for membership in the committee or nominate others.

The agency does not have to grant requests for membership or nominations, but it must offer the opportunity and it must take the requests into account when determining the final composition of the committee. (5 U.S.C. §565(a)) The convenor and the agency staff should talk with these parties, or otherwise contact them, and determine whether they really do represent additional interests or whether those interests are already adequately represented. The agency may either expand the proposed membership of the committee or try to negotiate an appropriate realignment of the membership to achieve better representation of all of the affected interests.

If, after considering the comments and applications received from the public, the agency decides not to establish a negotiated rulemaking committee, then the Reg-Neg Act requires publication of a notice of that decision in the Federal Register and other appropriate publications. (5 U.S.C. §565(a)(2)) The notice should also be sent to anyone who submitted an application or nomination for membership on the committee.

New issues may surface in the public comments or in the course of any resulting interviews. The convenor and the agency staff should review these and decide whether the issues are within the scope of the negotiation. If so, and if the agency is willing to negotiate these new issues, then the new issues should be scheduled for discussion at the initial or organizational meeting of the negotiating committee.

The agency also must now decide whether or not to use a mediator or facilitator, and if so, whom. All of the reg-negs to date have used the services of a third party neutral mediator or facilitator. The Reg-Neg Act assumes that a facilitator will be used and specifies a number of duties for that person, including chairing meetings and keeping records, as well as assisting the committee members in the negotiations. No one designated to represent the agency in the negotiations may serve as facilitator or otherwise chair the committee. (5 U.S.C. §566)

For large negotiations a team has been used to provide more complete assistance in facilitating both the plenary meetings of the group and of subcommittees or caucuses. Mediators can also be helpful in addressing disputes that may arise within a constituency that is not uniform in its view of the issues.

Careful selection of qualified and truly neutral third party "neutrals" is crucial to the success of the negotiation. Each member of the negotiation committee must have confidence in the mediator's skills in managing the process, in the mediator's neutrality on the issues under consideration, and in the mediator's lack of bias with respect to the parties. Often the convenor, if drawn from outside the agency's rulemaking staff, will have established the necessary trust and rapport with the parties during the convening process, and may be the best choice as a single mediator or as a member of a mediation team. Another advantage of using the convenor as mediator is that the convenor has built up considerable familiarity with the issues as well as the parties.

Agencies have used convenors and mediators from their own staff, from other agencies (Federal Mediation and Conciliation Service and Environmental Protection Agency), and from the private sector. See chapter 8 and the appendix to chapter 8 (especially Administrative Conference Recommendation 86-8) for further information on qualifications of neutrals, how to choose them, and how to obtain their services.

## The Federal Advisory Committee Act

Chapter 3 discusses the applicability of the Federal Advisory Committee Act (FACA), the guidelines and interpretations of that Act found in the General Services Administration's rule on committee management, and the approval of the Office of Management and Budget required by Executive Order 12838. The appendix to chapter 3 contains the texts of both the Act and the rule.

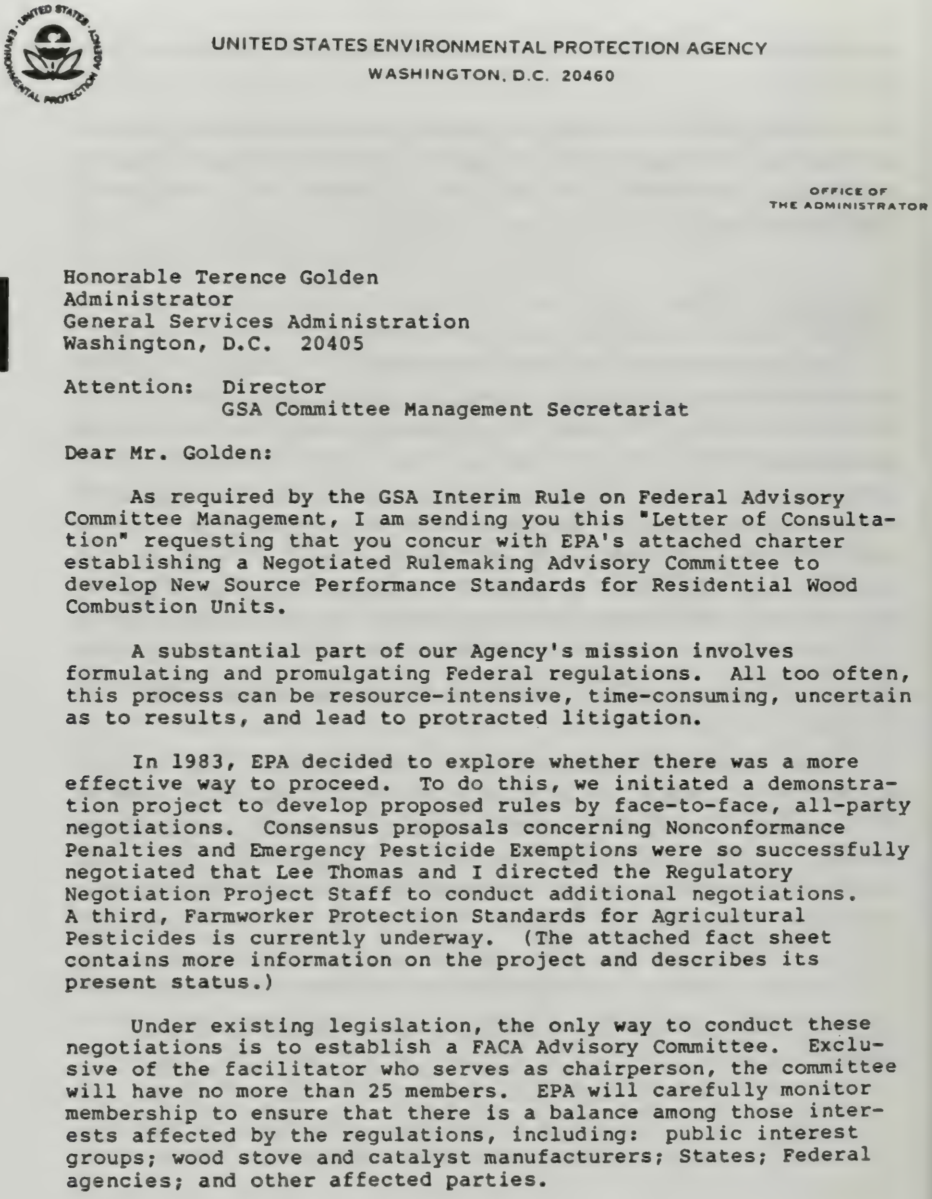
When an agency has determined to establish a committee for negotiating a rule, it ordinarily must file an advisory committee charter in accordance with FACA. Section 9(c) of FACA prohibits a committee from meeting or taking any action until a charter is filed. The formal requirements for chartering are found in the GSA regulations, 41 CFR §101-6.1013 and §101-6.1015 (see appendix to chapter 3).

The appendix to chapter 4 contains sample committee charters and Federal Register notices of intent -- documents that an agency will need in connection with establishing an advisory committee to negotiate a rule.

## Appendix

In addition to sample committee charters, related correspondence, and sample notices of intent to establish advisory committees to negotiate rules, the appendix to chapter 4 contains a memorandum to the Deputy Administrator of EPA, briefing him on the decision to proceed with a reg-neg on the woodburning stove rule. The memorandum lists the documents required by EPA for initiation of negotiations and requests sign-off. Although the woodburning stove notices pre-date passage of the Reg-Neg Act, they illustrate all of the steps required by the Act, including the requirement that the notice of intent to establish a committee offer an opportunity for additional individuals or interests to apply for membership or representation.

Other Federal Register notices in the appendix illustrate how agencies have complied with the public notice requirements under the Reg-Neg Act and FACA that pertain to convening a reg-neg and starting negotiations. The letter to the Occupational Safety and Health Administration about the feasibility of negotiating a benzene regulation illustrates the kind of information that the convening process should identify. The appendix also contains a copy of a court order granting a continuance to allow time for resolution of issues through negotiated rulemaking by the Department of the Interior.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
THE ADMINISTRATOR

Honorable Terence Golden
Administrator
General Services Administration
Washington, D.C. 20405

Attention: Director
GSA Committee Management Secretariat

Dear Mr. Golden:

As required by the GSA Interim Rule on Federal Advisory Committee Management, I am sending you this "Letter of Consultation" requesting that you concur with EPA's attached charter establishing a Negotiated Rulemaking Advisory Committee to develop New Source Performance Standards for Residential Wood Combustion Units.

A substantial part of our Agency's mission involves formulating and promulgating Federal regulations. All too often, this process can be resource-intensive, time-consuming, uncertain as to results, and lead to protracted litigation.

In 1983, EPA decided to explore whether there was a more effective way to proceed. To do this, we initiated a demonstration project to develop proposed rules by face-to-face, all-party negotiations. Consensus proposals concerning Nonconformance Penalties and Emergency Pesticide Exemptions were so successfully negotiated that Lee Thomas and I directed the Regulatory Negotiation Project Staff to conduct additional negotiations. A third, Farmworker Protection Standards for Agricultural Pesticides is currently underway. (The attached fact sheet contains more information on the project and describes its present status.)

Under existing legislation, the only way to conduct these negotiations is to establish a FACA Advisory Committee. Exclusive of the facilitator who serves as chairperson, the committee will have no more than 25 members. EPA will carefully monitor membership to ensure that there is a balance among those interests affected by the regulations, including: public interest groups; wood stove and catalyst manufacturers; States; Federal agencies; and other affected parties.

As our attached charter indicates, New Source Performance Standards for Residential Wood Combustion Units, under the Clean Air Act as amended, is our fourth negotiation item.

I believe that this negotiation is well worth conducting in terms of the potential gain to all affected parties, including the Federal government, and that there is no alternative to chartering a committee to act as the vehicle for the negotiation itself.

If you or your staff have any questions, please contact Chris Kirtz, the Project Director, at 382-7565.

We would appreciate receiving your concurrence as soon as possible.

Thank you in advance for your assistance.

Sincerely,

A. James Barnes
Deputy Administrator

Attachments (2)

## UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

## ADVISORY COMMITTEE CHARTER

### ORGANIZATION AND FUNCTIONS - COMMITTEES, BOARDS, PANELS AND COUNCILS

### NEW SOURCE PERFORMANCE STANDARDS FOR RESIDENTIAL WOOD COMBUSTION UNITS NEGOTIATED RULEMAKING ADVISORY COMMITTEE

1. PURPOSE: This charter establishes the New Source Performance Standards for Residential Wood Combustion Units Advisory Committee, in accordance with the provisions of the Federal Advisory Committee Act (FACA), 5 U.S.C. (App. I) 9(c).

2. AUTHORITY: It is determined that establishment of this Committee is in the public interest and supports EPA in performing its duties and responsibilities under Section 111 of the Clean Air Act, as amended.

3. OBJECTIVE AND SCOPE OF ACTIVITY: The Committee will serve as an integral part of EPA's development of New Source Performance Standards For Residential Wood Combustion Units. It will attempt, via face-to-face negotiations, to reach consensus on concepts and language to use as the basis of the Notice of Proposed Rulemaking.

4. FUNCTIONS: As indicated above, the Committee's function is to assist directly in the development of the standard. In addition, the Committee's success or lack thereof, will help EPA assess: the value of developing regulations by negotiation; the types of regulations which are most appropriate for this process; and the procedures and circumstances which best foster successful negotiations.

5. COMPOSITION: The Committee will consist of not more than twenty members, plus a facilitator who is appointed by the EPA Deputy Administrator, and who will serve as Chairperson. Members will represent the following segments of the population in appropriate mix and balance:

a. Woodstove manufacturers;

b. Catalyst manufacturers;

c. Public interest groups interested in the development and enforcement of environmental regulations relating to the use of residential wood combustion units;

d. State and Federal agencies affected by these regulations; and

e. Other interested and affected parties.

ADVISORY COMMITTEE CHARTER

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Appropriate members shall be selected and appointed for the duration of the negotiation itself. A full-time salaried official or regular employee of the Agency will be designated as the Executive Secretary who will be present at all meetings and is authorized to adjourn any meeting whenever it is determined to be in the public interest to do so. The Committee is authorized to form subcommittees composed entirely of committee members for any purpose consistent with this charter. Such subcommittees shall report back to the full Committee.

EPA will not compensate members for their service, though it will pay travel and per diem expenses when necessary and appropriate. The Committee's estimated annual operating cost is approximately $40,000, which includes 0.6 work years of staff support. EPA's Office of Policy, Planning and Evaluation will provide the necessary Committee support.

6. MEETINGS: Meetings shall be held as necessary, at the call of the Chairperson, with an agenda for each meeting approved in advance by the Executive Secretary. Committee meetings will be called, announced, and held in accordance with the EPA Committee Management Manual. This manual contains the Agency's policies and procedures for implementing FACA. Among other things, FACA requires open meetings, and an opportunity for interested persons to file comments before or after meetings, or to make statements to the extent that time permits. Subcommittees shall meet subject to the same conditions.

7. DURATION: The Committee will terminate by September 30, 1986, unless the Deputy Administrator determines that the Committee will finish its work within 30 days of the original termination date. If the Deputy Administrator makes such a determination, he can extend the termination date by 30 days without further approval by OMB or GSA. In the event more time is needed, EPA may seek an extension under Section 14 of FACA.

A. James Barnes
Deputy Administrator

3/18/86
Approval Date
MAR 18 1986

OMB/GSA Review Date
MAR 19 1986

Date Filed with Congress

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## DEPARTMENT OF TRANSPORTATION

## CHARTER

## OIL SPILL RESPONSE PLAN NEGOTIATED RULEMAKING COMMITTEE

**PURPOSE:** This Charter establishes the Oil Spill Response Plan Negotiated Rulemaking Committee (OSRPNRC) for the Coast Guard's rulemaking on oil spill response and sets forth guidelines for its operation. The committee is established under the authority of the Federal Advisory Committee Act (FACA) (5 U.S.C. App.) (Pub.L. 92-463) and the Negotiated Rulemaking Act of 1990 (Reg Neg Act) (Pub.L. 101-648) and shall be governed by the provisions of those statutes.

**SCOPE AND OBJECTIVES:** The committee shall advise the Coast Guard on a rulemaking to establish regulations for oil spill response under sections 311(j)(5) and (j)(6)(B) of the Federal Water Pollution Control Act (FWPCA) (33 U.S.C. 1321 et seq.), as amended by section 4202 of the Oil Pollution Act of 1990 (Pub.L. 101-380) (OPA 90). The committee shall act solely in an advisory capacity to the Coast Guard and shall not exercise program management responsibility nor make decisions directly affecting the matters on which it provides advice.

**DUTIES:** The committee shall be responsive to specific assignments made by the sponsor. The committee shall consider the matters proposed by the sponsor and shall attempt to reach a consensus on portions of a proposed rule for oil spill response plans. If the committee reaches consensus on a proposal, it shall submit a report containing the proposal to the sponsor. If the committee does not reach a consensus, it shall submit a report on any areas on which a consensus was reached. The proposed rule to be published by the Coast Guard shall include any proposals on which the committee reached consensus. After reviewing the public comments on its proposals, the committee will attempt to reach a consensus on proposals for a final rule and will submit a report to the sponsor.

**DURATION:** Until completion of the subject rulemaking or until the expiration of this Charter, whichever occurs first, unless terminated earlier under the provisions of 5 U.S.C. 587.

**OFFICIAL TO WHOM THE COMMITTEE REPORTS:** Chief, Office of Marine Safety, Security and Environmental Protection.

**SPONSOR AND OFFICES PROVIDING SUPPORT:** Chief, Office of Marine Safety, Security and Environmental Protection shall be the sponsor. The Office of Marine Safety, Security and Environmental Protection shall furnish support services.

**ESTIMATED ANNUAL COST:** Approximately 1.3 person years and $30,000.

**MEMBERSHIP:** The committee shall consist of approximately 17, but not more than 20, members appointed by the sponsor. Individuals, as opposed to group representatives, must be approved by the Secretary of Transportation. The committee shall be comprised of persons representing the interests affected by the regulations, including environmental and other public interest groups, states, vessel owners and operators, cleanup contractors, other affected private sector groups, and the U.S. Coast Guard. The Secretary of the Interior, the Administrator of the Environmental Protection Agency, the Maritime Administrator, and others, as requested by the sponsor, are authorized and encouraged to each designate one or more representatives to participate as observers or technical advisors.

**OFFICERS:** A facilitator shall serve as chairperson of the committee in accordance with the provisions of 5 U.S.C. 586(d). The sponsor may designate other officers as needed.

**MEETINGS:** (a) The committee shall meet and terminate at the call of the committee chairperson. The chairperson shall prepare agendas which will be reviewed and approved by a designated Federal Official.

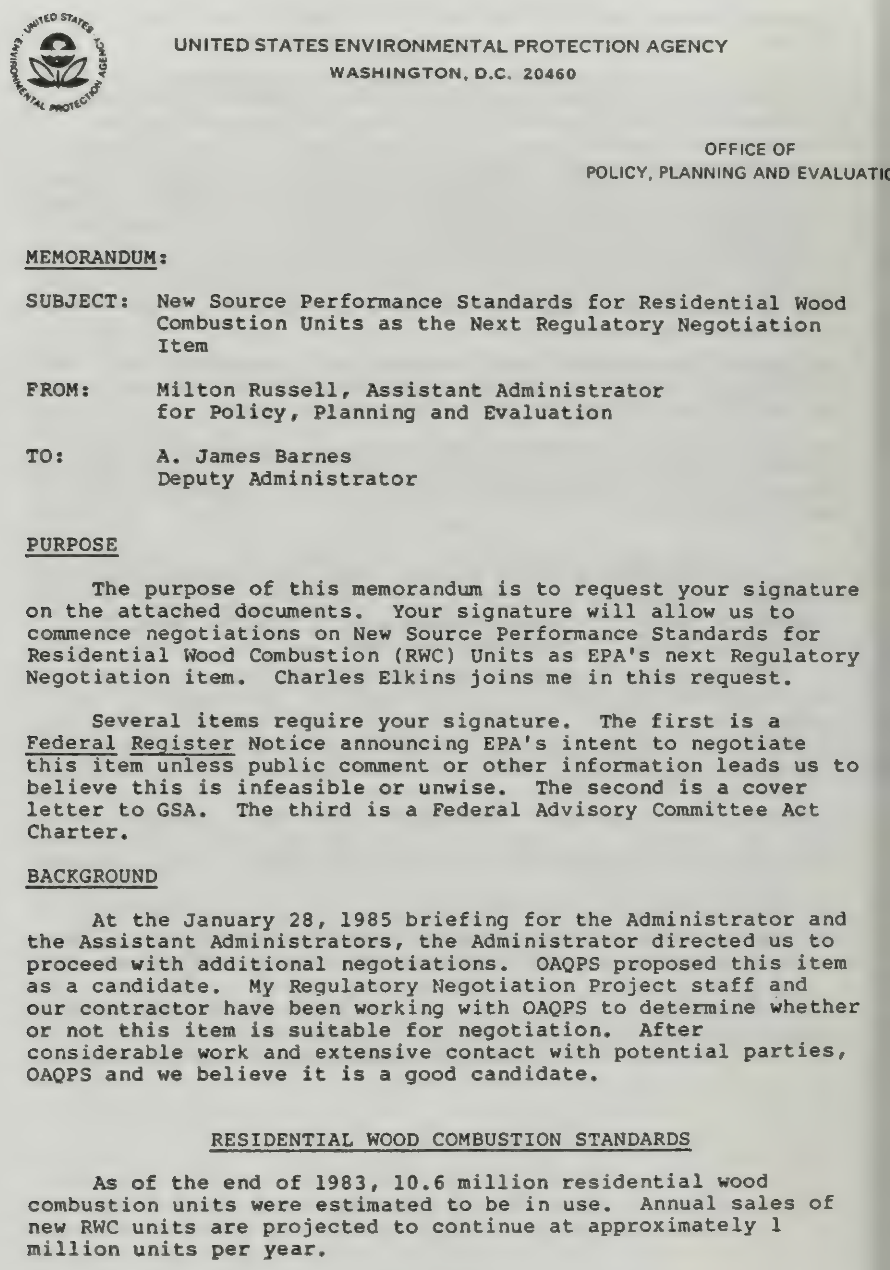
(b) Each committee meeting shall be open to the public. A notice of each meeting shall be published in the Federal Register at least fifteen days in advance of the meeting. Shorter notice is permissible in cases of emergency, but the reason for the emergency must be reported in the notice.

(c) Detailed minutes of each meeting shall be kept and their accuracy certified to by the committee chairperson. The minutes shall include time and place of the meeting, a record of the persons present, a complete summary of matters discussed and conclusions reached and copies of all reports received, issued or approved by the committee.

**COMPENSATION FOR MEMBERS:** The members shall be responsible for their own expenses of participation in the committee except to the extent that reimbursement is available under 5 U.S.C. 588(C).

**RECORDS AVAILABILITY:** Subject to 5 U.S.C. 552, the records, reports, minutes, agenda, or other documentation shall be made available for public inspection and copying at a single location in the offices of the Executive Secretary, Marine Safety Council.

**FILING DATE:** . This is the effective date of this Charter, which will expire two years subsequent to this date unless sooner terminated or extended.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
POLICY, PLANNING AND EVALUATI

MEMORANDUM:

SUBJECT: New Source Performance Standards for Residential Wood Combustion Units as the Next Regulatory Negotiation Item

FROM: Milton Russell, Assistant Administrator for Policy, Planning and Evaluation

TO: A. James Barnes
Deputy Administrator

### PURPOSE

The purpose of this memorandum is to request your signature on the attached documents. Your signature will allow us to commence negotiations on New Source Performance Standards for Residential Wood Combustion (RWC) Units as EPA's next Regulatory Negotiation item. Charles Elkins joins me in this request.

Several items require your signature. The first is a Federal Register Notice announcing EPA's intent to negotiate this item unless public comment or other information leads us to believe this is infeasible or unwise. The second is a cover letter to GSA. The third is a Federal Advisory Committee Act Charter.

### BACKGROUND

At the January 28, 1985 briefing for the Administrator and the Assistant Administrators, the Administrator directed us to proceed with additional negotiations. OAQPS proposed this item as a candidate. My Regulatory Negotiation Project staff and our contractor have been working with OAQPS to determine whether or not this item is suitable for negotiation. After considerable work and extensive contact with potential parties, OAQPS and we believe it is a good candidate.

### RESIDENTIAL WOOD COMBUSTION STANDARDS

As of the end of 1983, 10.6 million residential wood combustion units were estimated to be in use. Annual sales of new RWC units are projected to continue at approximately 1 million units per year.

Actual emissions from residential wood combustion units vary greatly depending upon the design and operation of the combustion device plus the type and condition of the fuel. However, data clearly indicate that particulate matter (PM) (which includes polycyclic organic matter (POM)), carbon monoxide (CO), and hydrocarbon (HC) emissions are substantial from residential wood combustion appliances.

It has been estimated that residential wood combustion contributes the following annual emissions: PM - 2.7 million tons, including POM - 20,000 tons; CO - 7.4 million tons; HC - 62,000 tons. If the sales of RWC units continue at 1 million units each year, annual emissions would increase by the following estimated amounts if not controlled: PM - 216,000 tons, including POM 1,600 tons; CO - 584,000 tons; HC - 5,000 tons.

Recent advances in both catalytic and non-catalytic woodstove control technology have brought about significant reductions (50 to greater than 90 percent of the emissions from conventional air-tight RWC units). EPA is aware that emissions from woodstoves pose a significant and growing problem, and that effective control technology is commercially available. On August 2, 1985, EPA announced plans to develop New Source Performance Standards for Residential Wood Combustion Units (50 FR 31504).

## SELECTION OF THIS ITEM FOR REGULATORY NEGOTIATION

To qualify for negotiation, an item must meet the following selection criteria:

- be at the pre-proposal stage of development;
- have a relatively limited number of identifiable parties who will come to the table to negotiate in good faith;
- present a limited number of specific issues for which sufficient information and technology is in hand for resolution; and
- contain a time-forcing factor which lends an air of urgency to its issuance.

We feel that this item meets the selection criteria. It is at the pre-proposal stage; affected interests are identifiable and limited in number; we have contacted potential participants and believe they are interested in negotiating this item in good faith; sufficient information is in hand (and/or will be developed during the negotiations) to resolve the issues the program office has identified for negotiation; and EPA is publicly committed to proposing the regulation expeditiously.

## DESCRIPTION OF SIGNATURE DOCUMENTS

### Federal Advisory Committee Charter

To conduct negotiations, we must first charter a Federal Advisory Committee. The charter is a document that you sign which explains what the committee will do. After GSA and OMB consultation, we file it with the appropriate Congressional Committees.

### Letter to GSA

Obtaining a charter requires that you send a proposed charter and a letter to GSA justifying the need to establish the committee. GSA then forwards the request to OMB. We have already been in touch with GSA and OMB and anticipate no major difficulties.

### Federal Register Notice

The *Federal Register* Notice announces EPA's intent to establish an advisory committee to negotiate new source performance standards for residential wood combustion units. It lists our reasons for selection, the key issues we expect to discuss, potentially affected parties and participants, the date of an open organizational meeting with potential participants, and the tentative date of the first negotiation meeting. It clearly invites the public to comment and indicates that we are open to the possibility of not negotiating this new source performance standard based on the comments we receive or further information we obtain. Parties or interests who feel that they are not adequately represented by the listed participants may so comment, give their rationale, and request membership or representation on the negotiating committee.

### RECOMMENDATION

Charles Elkins joins me in requesting that you sign the attached GSA letter, charter, and *Federal Register* Notice.

Concur: ______________________________

Charles L. Elkins
Acting Assistant Administrator
for Air and Radiation

Attachments (3)

## 51 Fed. Reg. 4800 (Feb. 7, 1986)

### ENVIRONMENTAL PROTECTION AGENCY

[FRL-2965-8]

### Intent To Form an Advisory Committee To Negotiate New Source Performance Standards for Residential Wood Combustion Units

**SUMMARY:** EPA is considering establishing a new Advisory Committee under the Federal Advisory Committee Act (FACA). The Committee's purpose would be to negotiate issues leading to a Notice of Proposed Rulemaking on New Source Performance Standards (NSPS) for Residential Wood Combustion (RWC) units, under section 111 of the Clean Air Act, as amended. The Committee would consist of representatives of parties with a

4801

definable stake in the outcome of the proposed rule.

**DATE:** EPA must receive comments and suggestions by March 10, 1986.

**ADDRESS:** Comments should be submitted (in duplicate if possible) to: Central Docket Section LE-131, Environmental Protection Agency, Attn: Docket No. A-84-49, 401 M Street, SW., Washington, DC 20460.

Docket No. A-84-49, containing materials relevant to this rulemaking, is located in the U.S. Environmental Protection Agency, Central Docket Section, West Tower Lobby, 401 M Street SW., Washington, DC. The docket may be inspected between 8 a.m. and 4 p.m. on weekdays, and a reasonable fee may be charged for copying.

**FOR FURTHER INFORMATION CONTACT:** Chris Kirtz, Director, Regulatory Negotiation Project, U.S.E.P.A. (PM-223), 401 "M" Street SW., Washington, DC 20460, (202) 382-7565.

**SUPPLEMENTARY INFORMATION:**

Outline of Notice

*I. Project Background*

A. The Concept of Regulatory Negotiation
B. Negotiations to Date
C. Residential Wood Combustion (RWC) Standards as a Negotiation Item
  1. Need for Standards
  2. Selection as a Negotiation Item
D. Key Issues for Negotiation

*II. Negotiation Procedures*

A. Formal Negotiation Procedures

1. Procedure for Establishing an Advisory Committee.
2. Participants.
3. Requests for Representation.
4. Final Notice.
5. Tentative Schedule.
6. Failure of Advisory Committee to Reach Consensus.

B. Internal Negotiation Procedures

1. Facilitator
2. Good Faith Negotiation
3. Administrative Support and Meetings
4. Defining Consensus
5. Record of Meetings
6. Committee Procedures
7. Potential Interests and Participants

### Outline of Notice

### *I. Project Background*

### A. The Concept of Regulatory Negotiation

The increasingly formal nature of the rulemaking process can impede an agency in developing sound regulatory solutions. The traditional rulemaking process of comment and reply can lead to adversarial relationships among participants and little opportunity for the exchange of information and ideas conducive to developing workable solutions.

On February 22, 1983, EPA announced in the Federal Register, 48 FR 7494-7495, that it was beginning a project to explore the extent to which negotiations among interested parties could serve as an alternative to its current rulemaking process—an alternative that could better conserve time and resources and minimize costly litigation.

The project's stated purposes are to test:

- The value of developing regulations by negotiation;
- The types of regulations which are most appropriate for negotiated rulemakings; and
- The procedures and circumstances which best foster negotiations.

The project brings together a balanced mix of parties and interests to negotiate at the pre-proposal stage. The goal of each negotiation is to reach a consensus on which to base a Notice of Proposed Rulemaking (NPRM). EPA intends to use any consensus that is justified and within its statutory authority as the basis of the proposal. Negotiations are conducted through Advisory Committees chartered under the Federal Advisory Committee Act (FACA). All procedural requirements of the Administrative Procedure Act and other applicable statutes continue to apply.

A senior official selected by the EPA office responsible for developing the rule acts as chief negotiator for EPA. Individuals representing definable interests in the regulated community, enforcement officials, and other affected stakeholders negotiate on behalf of their constituencies. A neutral facilitator chairs the negotiations, keeps the process moving smoothly, and assists in resolving disputes.

EPA is optimistic that this process can produce better regulations, use all parties' time and resources more wisely, and reduce litigation and uncertainty.

B. Negotiations to Date

EPA has already successfully conducted two such regulatory negotiations and has a third well underway. The first involved Nonconformance Penalties under section 206(g) of the Clean Air Act, as amended. In the time allowed, the group achieved consensus on the core issues. This consensus was used as the basis of the proposed rulemaking. The proposal drew only thirteen comments, all from participants supporting the consensus. Six specifically requested that EPA conduct additional negotiations on other proposed regulations. A final rule was issued on August 30, 1985. It has not been challenged legally.

The second involved Emergency Pesticide Exemptions under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Again within the time allowed, the group reached full consensus on the exact wording for the proposal and preamble. EPA received nineteen comments on the proposal. Three were from participants supporting the proposal; the others raised relatively narrow points of interpretation or concern. A final rule was issued on January 15, 1986.

The third negotiation, on Farmworker Protection Standards for Agricultural Pesticides, started on November 4, 1985, and is scheduled to end on March 7, 1986.

C. Residential Wood Combustion (RWC) Standards as a Negotiation Item

1. *Need for Standards.* At the end of 1983, EPA estimates that 10.6 million RWC units were in use. Annual sales of new RWC units are projected to continue at a rate of approximately 1 million units per year.

Actual emissions from RWC units vary greatly, depending upon the design and operation of the combustion device and the type and condition of the fuel. However, data clearly indicate that particulate matter (PM) (which includes polycyclic organic matter (POM)), carbon monoxide (CO), and hydrocarbon (HC) emissions are substantially from RWC appliances.

EPA estimates that RWC units contribute the following annual emissions: PM—2.7 million tons, including POM—20,000 tons; CO—7.4 million tons; HC—62,000 tons. If the sales of RWC units continue at a rate of 1 million units each year, annual emissions would increase by the following estimated amounts if not controlled: PM—216,000 tons, including POM—1,600 tons; CO—584,000 tons; and HC—5,000 tons.

Recent advances in both catalytic and non-catalytic woodstove control technology have brought about significant reductions (50 to greater than 90 percent) of the emission from conventional air-tight RWC units. EPA is aware that emissions from woodstoves pose a significant and growing problem, and that effective control technology is commercially available. On August 2, 1985, EPA announced plans to develop New Source Performance Standards for Residential Wood Combustion Units (50 FR 31504).

2. *Selection as a Negotiation Item.* EPA believes that proposed NSPS for RWC units may be appropriate for development by the regulatory negotiation process. EPA has made a preliminary inquiry among potential parties and representatives of identified interests to determine if EPA's selection criteria for choosing a candidate for a negotiated rulemaking were satisfied. To qualify under EPA's selection criteria, an item must:

4802

- Be at a pre-proposal stage of development;
- Have a relativelyl small number of identifiable parties, in an appropriate balance and mix, who have a good faith interest in negotiating a consensus;
- Present a limited number of related issues for which sufficient information is available for resolution; and
- Have a time factor that lends some urgency to issuing the regulation.

On the basis of this preliminary inquiry, EPA believes that its selection criteria have been met and that negotiations on this rule can be successful. This item is at the pre-proposal phase of development, affected interests are limited in number, and groups representing these interests are identifiable and in an appropriate balance and mix. EPA has contacted them and believes they are interested in negotiating this item in good faith, and are aligned on key issues to address and schedule and groundrules to follow. EPA's lead program office has identified a number of basic issues for which sufficient information is in hand (or will be developed during the negotiations) for resolution; and EPA is publicly committed to establishing NSPS for RWC units expeditiously.

### D. Key Issues for Negotiations

We anticipate the key issues to be addressed will include the following:

- How should the affected facility be defined?
- What are the most appropriate methods and procedures for measuring emissions and efficiencies from woodstoves? This issue includes examining factors affecting emissions and measurements such as the sampling train, gas flow measurements, wood loading, burn rate, and altitude effects.
- What is the best demonstrated technology?
- In what units should the standard be expressed?
- What should the numerical emission limit be?

When should the emission limits become applicable?

- What type of woodstove certification and/or lab accreditation program should be established?
- What labeling requirements, if any, should there be?
- How should catalyst replacement be addressed?

### *II. Negotiation Procedures*

EPA requests public comment on whether it should:

- Establish a Federal Advisory Committee;
- Identify interests it believes are affected by the key issues listed above;
- Identify participants who will adequately represent the interests affected by the negotiations; and
- Use regulatory negotiations for this rulemaking, and the extent to which the issues, parties, and procedures are adequate and appropriate.

This Notice also announces:

- The date, time, location, and purpose of an informal organizational meeting to discuss whether the Committee should be formed and negotiations proceed; and
- The tentative date, time, location, and subject matter of the first negotiation meeting (if the Committee is formed).

The following procedures and guidelines will apply to the Committee, if formed, unless they are modified as a result of comments received on this Notice or during the negotiating process.

A. Formal Negotiation Procedures

*1. Procedure for Establishing an Advisory Committee.* As a general rule, an agency of the federal government is required to comply with the requirements of FACA when it establishes or uses a group which includes non-federal members as a source of advice. Under FACA, an Advisory Committee is established only after both consultation with GSA and receipt of a charter. EPA has prepared a charter and has initiated the requisite consultation process. Only upon the successful completion of this process and the receipt of the approved charter will EPA form the Committee and commence negotiations.

*2. Participants.* The negotiating group should not exceed 25 participants. A number larger than this could make it difficult to conduct effective negotiations. One purpose of this notice is to help determine whether the standard that EPA is developing would substantially affect interests not adequately represented by the proposed participants (listed later in this Notice). We do not believe that each potentially affected organizational or individual must necessarily have its own representative. However, we firmly believe that each interest must be adequately represented. Moreover, we must be satisfied that the group as a whole reflects a proper balance and mix of interests.

*3. Requests for Representation.* If, in response to this Notice, an additional individual or representative of an interest requests membership or representation in the negotiating group, the Agency, in consultation with the facilitator, will determine whether that individual or representative should be added to the group. EPA will make that decision based on whether the individual or interest:

- Would be substantially affected by the rule;
- Is already adequately represented in the negotiating group.

*4. Final Notice.* After evaluating the results of the organizational meeting, and reviewing any comments on this Notice and request for representation, EPA will issue a final notice. That notice will announce the establishment of a Federal Advisory Committee unless EPA decides, based on comments and other relevant considerations, that such action is inappropriate, or in the event EPA's charter request is disapproved. The negotiation process will begin once the Committee is appropriately chartered and notice is published in the Federal Register.

5. *Tentative Schedule.* EPA will hold an organizational meeting on February 12, 1986, from 9:00 a.m. until completion, at The National Institute for Dispute Resolution, 1901 L Street NW., Suite 600, Washington, DC. This meeting is open, and potential participants are encouraged to attend.

The purpose of this meeting is to discuss whether negotiations should proceed, and if so, how the negotiations and Committee should function, what should and should not be covered, to answer questions, and to address any other procedural issues which may arise.

If the final determination is that the Committee should be formed and negotiations should proceed, EPA plans to hold the first meeting of the Advisory Committee on March 12, 1986, at the National Institute for Dispute Resolution. At this first meeting, participants would complete action on any procedural matters outstanding from the organizational meeting, determine how best to address the principal issues, and begin to address them.

To ensure timely issuance of the proposal, we intend to terminate the activities of the Committee if it does not reach consensus within four months of the first meeting. The process may end earlier if the facilitator so recommends.

6. *Failure of Advisory Committee to Reach Consensus.* In the event the

Committee is unable to reach consensus, EPA will proceed to develop its own proposal.

B. International Negotiation Procedures

1. *Facilitator.* EPA will use a facilitator. The facilitator will not be involved with the substantive development or enforcement of the regulation. The facilitator's role is to:

- Chair negotiating sessions;
- Help the negotiation process run smoothly; and
- Help participants define and reach consensus.

2. *Good Faith Negotiation.* Since participants must be willing to negotiate in good faith and be authorized to do so, each organization must designate a senior official to represent its interests. This applies to EPA as well, and the Agency will designate a senior official of the Office of Air Quality Planning and Standards as its representative.

3. *Administrative Support and Meetings.* EPA's Regulation Management Branch will supply logistical, administrative and management support. Meetings will be held in the Washington area. To support the negotiations, EPA has pledged funds to a resource pool which the National Institute for Dispute Resolution will administer. EPA expects that funds from private foundations will also be available. These funds may be used by the parties for such activities as training, technical support, computer simulations, and other assistance which the parties deem useful. To give committee members maximum freedom, subject to any applicable legal constraints, they will determine the procedures under which requests for funds will be made and approved.

4. *Defining Consensus.* The goal of the negotiating process is consensus. In the negotiations completed to date, consensus has meant that each interest concurs in the result. We expect the participants to fashion their own working definition of this term.

5. *Record of Meetings.* In accordance with FACA's requirements, EPA will keep a record of all Advisory Committee meetings. This record will be placed in the public docket for this rulemaking. EPA will announce Committee meetings in the Federal Register. Such meetings will generally be open to the public.

6. *Committee Procedures.* Under the general guidance and direction of the facilitator, and subject to any applicable legal requirements, the members will establish the detailed procedures for Committee meetings which they consider most appropriate.

7. *Potential Interests and Participants.* EPA has tentatively identified the following list of possible interests and parties:

*Woodstove Manufacturers*

Wood Heating Alliance
Woodcutters Manufacturing
Brugger Exports, Ltd.
a–b Fabricators
American Eagle Stoves

*Catalyst Manufacturers*

Corning Glass Works

*Public Interest Groups*

National Resources Defense Council
Consumers Union
Oregon Environmental Council
Consumer Federation of America

*State Officials*

Oregon Department of Environmental Quality
Colorado Air Pollution Control Division
Massachusetts Division of Air Quality Control
State and Territorial Air Pollution Program Administrators
The Association of Local Air Pollution Control Officials

*Federal Government*

Environmental Protection Agency

Comments and suggestions on this tentative list of representatives are invited. Anyone wishing to be included should explain the interest they represent and why that interest is not already represented. The listing of a potential group does not necessarily mean that the group has agreed to participate.

Dated: January 31, 1986.

**A. James Barnes,**
*Deputy Administrator.*

[FR Doc. 86–2587 Filed 2–6–86; 8:45 am]

BILLING CODE 6560-50-M

## 51 Fed. Reg. 8241 (March 10, 1986)

[OPPE-FRL-2981-9]

### New Source Performance Standards for Residential Wood Combustion Units Negotiated Rulemaking Advisory Committee; Establishment and Open Meeting

As required by section 9(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), we are giving notice of the establishment of an Advisory Committee to negotiate New Source Performance Standards for Residential Wood Combustion Units. We have determined that this is in the public interest and will assist the Agency in performing its duties prescribed in section 111 of the Clean Air Act, as amended.

Copies of the Committee charter will be filed with appropriate committees of Congress and the Library of Congress.

The committee's initial meeting will be held on Thursday, March 20, and Friday morning, March 21, 1986. Due to the need for an expeditious regulation, as a result of a January 1987 court-ordered deadline to issue a proposed rule, notice of this two-day meeting is being given less than 15 days prior to the meeting itself. The Agency issued this Notice promptly once the meeting dates were confirmed. The Committee has notified interested parties on its mailing list of the meeting dates.

Both March 20th and 21st, the meeting will be held at the National Institute for Dispute Resolution, 1901 L Street NW., Suite 600, Washington, DC. On March 20th, the meeting will start at 9:00 a.m. and run until completion; on March 21st, the meeting will start at 9:00 a.m. and run until approximately 12:00 noon.

The purpose of the meeting is to complete any outstanding procedural matters, to determine how best to address the substantive issues, and to begin to address them.

If interested in attending, or in receiving more information, please contact Chris Kirtz at (202) 382-7565.

Dated: March 6, 1986.

**Milton Russell,**

*Assistant Administrator for Policy, Planning and Evaluation.*

[FR Doc. 86-5294 Filed 3-7-86; 10:19 am]

BILLING CODE 6560-50-M

## 59 Fed. Reg. 42200 (Aug. 17, 1994)

**DEPARTMENT OF TRANSPORTATION**

**Federal Railroad Administration**

**49 CFR Part 214**

**[FRA Docket No. RSOR 13, Notice No. 1]**

**RIN 2130–AA86**

## Roadway Worker Protection

**AGENCY:** Federal Railroad Administration (FRA); DOT.

**ACTION:** Notice of Proposal to Form a Negotiated Rulemaking Advisory Committee and Request for Representation.

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**SUMMARY:** FRA proposes to establish a Negotiated Rulemaking Advisory Committee under the Negotiated Rulemaking Act of 1990 and the Federal Advisory Committee Act to develop a recommended rule concerning the protection of railroad roadway workers. The Committee would adopt its recommendations through a negotiation process. The Committee would be composed of persons who represent the interests affected by the rule, such as labor organizations, railroads, railroad associations, contractor associations, and the government. FRA invites interested parties to submit nominations and applications for membership on the Committee.

**DATES:** FRA must receive written comments and requests for representation or membership by September 16, 1994.

**ADDRESSES:** All written comments should be submitted in triplicate to the Docket Clerk, Office of Chief Counsel, FRA, 400 Seventh Street, S.W., Room 8201, Washington, D. C. 20590.

**FOR FURTHER INFORMATION CONTACT:** Christine Beyer, Trial Attorney, Office of Chief Counsel, FRA, 400 Seventh Street, S.W., Room 8201, Washington, D. C. 20590 (Telephone: 202–366–0621).

**SUPPLEMENTARY INFORMATION:**

### I. Background

#### *(A) History*

The Rail Safety Enforcement and Review Act, Pub.L. No. 102–365, 106 Stat. 972, enacted September 3, 1992, required FRA to review its track safety standards and revise them based on data presented during that review. Among the topics to be addressed was "an evaluation of employee safety." FRA issued an Advance Notice of Proposed Rulemaking (ANPRM) on November 16, 1992 (57 FR 54038) to announce the opening of a proceeding to amend the Federal Track Safety Standards (49 CFR Part 213). That ANPRM addressed the general topics to be considered, including standards for railroad track itself, and protecting maintenance-of-way and other non-operating railroad employees from the hazards of moving railroad equipment.

As part of that proceeding, FRA conducted a series of workshops to obtain the industry's views on the need for and substance of any changes to FRA's regulations. One such workshop session, announced in Notice No. 4 of that ANPRM issued on February 18, 1993 (58 FR 8928), and held in Washington, D.C. on March 31, 1993 addressed specifically the issue of protection of roadway workers from being struck by moving trains and equipment. Since that workshop, FRA has received petitions for emergency orders and rulemaking on the topic from the Brotherhood of Maintenance-of-Way Employees and the Brotherhood of Railroad Signalmen.

FRA originally planned to include protection from moving trains and moving equipment into a new Subpart G of 49 CFR Part 213, but it will now be considered as part of 49 CFR Part 214, Railroad Workplace Safety. Given FRA's desire to address this issue on an expedited basis, and because it relates more closely to workplace safety than to track standards, this proceeding is now separated from FRA Docket No. RST–

90–1 and has been placed in FRA Docket No. RSOR 13. Items related to this subject which were submitted as part of Docket No. RST–90–1 will be considered as part of this proceeding, as will the transcript of the public workshop on March 31, 1993.

*(B) Purpose*

FRA is taking this action for the purpose of reducing the risk of death or injury railroad roadway workers face when struck by moving trains and railroad equipment. Since 1989, 21 roadway workers have been fatally

injured by moving trains and equipment. Eight workers were struck by trains while performing work, three were struck by trains on track adjacent to the work location, five stepped into a train's path, and five were struck by maintenance-of-way equipment. These fatalities are among the following crafts: signal maintainers, machine operators, welders, track foremen, track inspectors, and track laborers.

These figures reflect a serious problem that may require changes in railroad operating rules, training and practices. In order to address the problem in the short term, FRA Administrator Molitoris convened a meeting on June 3, 1994 at which FRA distributed summaries of the fatalities, and enlisted the support of the industry to address the issue immediately on each railroad through local labor/management committees. FRA also discussed the option of proceeding with a negotiated rulemaking, and has since preliminarily concluded that this issue is an appropriate subject for negotiated rulemaking.

*(C) Terminology*

FRA proposes that the term "roadway worker" rather than "maintenance of way employee" be used in this proceeding to define the subject persons. This term would encompass all employees of a railroad or a contractor to a railroad who construct, maintain, inspect or repair railroad tracks, structures, signal and train control systems, communication systems, utility systems, or any other fixed property of a railroad while in close or potentially close proximity to tracks on which trains or equipment can be operated. The term would apply regardless of the craft or class title of the employee, affiliation with any labor organization, or rank within the railroad organization. Examples of subject persons would be trackmen, signal maintainers, bridge workers, communication technicians, electricians, surveyors, roadmasters and chief engineers, while performing their duties along the line of road.

FRA believes that extensive input from all interested parties is necessary to develop a rule that will address both the risk of injury from moving railroad equipment and the operational concerns that this issue presents. Therefore, this notice announces FRA's proposal to address these issues through a negotiated rulemaking.

Set forth below are the basic concepts of negotiated rulemaking, suggested procedures to be followed, and criteria for participant selection. In order to begin this process shortly, FRA asks that parties representing interests affected by a roadway worker safety rule request appointment or representation on the Committee within thirty days of publication of this notice.

**II. Regulatory Negotiation**

Due to the increasing complexity and formalization of the written rulemaking process, it can be difficult for an agency to craft effective regulatory solutions to certain problems. In the typical rulemaking process, the participants often develop adversarial relationships that prevent effective communication and creative solutions. The exchange of ideas that may lead to solutions acceptable to all interested groups often does not occur in the traditional notice and comment system. As the Administrative Conference of the United States (ACUS) noted in its Recommendation 82–4:

> Experience indicates that if the parties in interest were to work together to negotiate the text of a proposed rule, they might be

> able in some circumstances to identify the major issues, gauge their importance to the respective parties, identify the information and data necessary to resolve the issues, and develop a rule that is acceptable to the respective interests, all within the contours of the substantive statute.

ACUS adopted this recommendation in "Procedures for Negotiating Proposed Regulations," 47 FR 30708, June 18, 1982. The thrust of the recommendation is that representatives of all interests should be assembled to discuss the issue or hazard and all potential solutions, reach consensus, and prepare a proposed rule for consideration by the agency. After public comment on any proposal issued by the agency, the group would reconvene to review the comments and make recommendations for a final rule. This inclusive process is intended to make the rule more acceptable to all affected interests and prevent the need for petitions for reconsideration and litigation that often follow promulgation of a final rule.

The movement toward negotiated rulemaking gained impetus with enactment of the Negotiated Rulemaking Act of 1990 (Reg-Neg), 5 U.S.C. § 561, *et seq.* More recently, President Clinton issued Executive Order 12866 (EO) (58 FR 51735, October 4, 1993), which states the need to reform the current regulatory process into one that is effective, consistent, and understandable. The objectives of the EO are:

> To reaffirm the primacy of Federal agencies in the regulatory decision-making process; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public.

*Id.* Section 6(a) of the EO charges government agencies with providing the public meaningful participation in the regulatory process:

> In particular, before issuing a notice of proposed rulemaking, each agency should, where appropriate, seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulation . . . Each agency is also directed to explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

*Id.* at 51740.

Although relatively new, negotiated rulemakings have been used successfully by many regulatory agencies, including the Federal Aviation Administration, the United States Coast Guard, the Environmental Protection Agency, and the Occupational Safety and Health Administration. FRA now intends to begin this process in a formalized manner for the first time, and does so with enthusiasm and high expectations. FRA welcomes the opportunity to work with those who will be affected directly by a roadway worker safety rule, and is confident that the agency and the industry will benefit from the process by creating an effective and reasonable regulation.

Pursuant to section 563(a) of Reg-Neg, an agency considering rulemaking by negotiation should consider whether:

(1) There is a need for the rule;

(2) There is a limited number of identifiable interests;

(3) These interests can be adequately represented by persons willing to negotiate in good faith to reach a consensus;

(4) There is a reasonable likelihood that the committee will reach consensus within a fixed period of time;

(5) The negotiated rulemaking procedure will not unreasonably delay the notice of proposed rulemaking;

(6) the agency has adequate resources and is willing to commit such resources to the process; and

(7) The agency is committed to use the result of the negotiation in formulating a proposed rule if at all possible.

For the reasons stated in this Notice, FRA believes that these criteria have been met with respect to railroad roadway safety issues.

The regulatory negotiation FRA proposes would be carried out by an advisory committee (Committee) created under the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C. App., and in a manner that reflects appropriate rulemaking objectives, including pertinent Executive Orders. FRA will be represented on the Committee and will take an active part in the negotiations as a Committee member. However, pursuant to section

566(c) of Reg-Neg, the person(s) designated to represent FRA would not facilitate or otherwise chair the proceedings. The agency is committed to this process and is quite optimistic that it will result in the issuance of an NPRM and final rule that will be acceptable to the members of the Committee. Because of the need to issue a rule on this subject, FRA is prepared to go forward with an NPRM that is not the product of the negotiations in the unlikely event the negotiation fails or if the Committee's recommendation is not acceptable.

## III. Procedures and Guidelines

The following proposed procedures and guidelines would apply to this process, subject to appropriate changes made as a result of comments received on this Notice or as are determined to be necessary during the negotiating process.

(A) *Facilitator:* FRA is seeking the services of a facilitator for the negotiating group. The facilitator will not be involved with substantive development of this regulation. This individual will chair the negotiations, may offer alternative suggestions toward the desired consensus, will help participants define and reach consensus, and will determine the feasibility of negotiating particular issues. The facilitator may ask members to submit additional information or to reconsider their position. FRA will contact mediation organizations for potential candidates, and will consider nominations made in comments received in response to this Notice.

(B) *Feasibility:* FRA has examined the issues and interests involved and has made a preliminary inquiry among representatives of those interests to determine whether it is possible to reach agreement on: (a) individuals to represent those interests; (b) the preliminary scope of the issues to be addressed; and (c) a schedule for developing a notice of proposed rulemaking. On the basis of the history of this issue and our preliminary inquiry, we believe that regulatory negotiation could be successful in developing a workable proposal for a notice of proposed rulemaking and a final rule, and that the potential participants listed below would adequately represent the affected interests.

(C) *Participants and Interests:* The number of committee participants generally should not exceed 25.

Please note that each individual or organization affected by a final rule need not have its own representative on the Committee. Rather, each interest must be adequately represented, and the Committee should be fairly balanced. Individuals who are not part of the Committee may attend sessions and confer with or provide their views to Committee members.

The following interests have been tentatively identified as those that are likely to be significantly affected by the rule:

(1) Railroad labor organizations;

(2) Railroads, including classes 1 through 3, the short lines, public transit operations, and their associations;

(3) Contractors to railroads who perform roadway work; and

(4) The Federal government.

FRA proposes that persons selected by the various interests be named to the Committee. The following interests have been tentatively identified as those that would supply Committee members:

(1) The Brotherhood of Maintenance-of-Way Employes;

(2) The Brotherhood of Railroad Signalmen;

(3) The American Train Dispatchers Association;

(4) The Association of American Railroads;

(5) The American Short Line Railroad Association;

(6) American Public Transit Association; and

(7) FRA.

As indicated in paragraph F of this notice, FRA invites applications for representation from any interests that will be affected by a rule, but are not named in this list. FRA is committed to an open and comprehensive negotiation, and therefore strongly encourages any such party to file an application for membership. These applications may come from railroads, labor organizations, associations, or other interests, must be filed within thirty days, and must meet the requirements set forth in this notice. Also, the interests listed above and those who apply for representation on the Committee should provide the name(s) of the individual(s) they propose to represent their interests. The Committee should not exceed twenty-five members.

(D) *Good Faith:* Participants must be committed to negotiate in good faith. It is therefore important that senior individuals within each interest group be designated to represent that interest. No individual will be required to "bind" the interests he or she represents, but the individual should be at a high enough level to represent the interest with confidence. For this process to be successful, the interests represented should be willing to accept the final Committee product.

(E) *Notice of Intent to Establish Advisory Committee and Request for Comment:* In accordance with the requirements of FACA, an agency of the Federal government cannot establish or utilize a group of people in the interest of obtaining consensus advice or recommendations unless that group is chartered as a Federal advisory committee. It is the purpose of this Notice to indicate our intent to create a Federal advisory committee, to identify the issues involved in the rulemaking, to identify the interests affected by the rulemaking, to identify potential participants who will adequately represent those interests, and to ask for comment on the use of regulatory negotiation and on the identification of the issues, interests, procedures, and participants.

(F) *Requests for Representation:* One purpose of this Notice is to determine whether interests exist that may be substantially affected by a rule, but have not been represented in the list of prospective Committee members. Please identify such interests if they exist. Each application for membership or nomination to the Committee should include: (i) the name of the applicant or nominee and the interests such person would represent; (ii) evidence that the applicant or nominee is authorized to represent parties related to the interests the person proposes to represent; (iii) a written commitment that the applicant or nominee would participate in good faith; and (iv) the reasons any representative identified in the Notice does not represent the interests the nominee is alleged to represent. If an additional person or interest requests membership or representation on the Committee, FRA shall determine (i) whether that interest will be substantially affected by the rule, (ii) if such interest would be adequately represented by an individual already on the Committee, and (iii) whether the requester should be added to the group or whether interests can be consolidated to provide adequate representation.

(G) *Final Notice:* After evaluating comments received as a result of this notice, FRA will issue a final notice announcing the establishment of the Federal advisory committee, unless it determines that such action is inappropriate in light of comments received, and the composition of the Committee. After the Committee is chartered the negotiations would begin.

(H) *Administrative Support and Meetings:* Staff support would be provided by FRA and meetings would take place in Washington, D.C., unless agreed otherwise by the Committee.

(I) *Tentative Schedule:* If the Committee is established and selected, FRA will publish a schedule for the first meeting in the Federal Register. The first meeting will focus on procedural matters, including dates, times, and locations of future meetings. Notice of subsequent meetings would also be published in the Federal Register before being held.

FRA expects that the Committee would reach consensus and prepare a report recommending a proposed rule within six months of the first meeting. However, if unforeseen delays occur, the Administrator may agree to an extension of that time if a consensus of the Committee believes that additional time will result in agreement. The process may end earlier if the facilitator so recommends.

(J) *Committee Procedures:* Under the general guidance of the facilitator, and subject to legal requirements, the Committee would establish the detailed procedures for meetings which it considers appropriate.

(K) *Record of Meetings:* In accordance with FACA's requirements, FRA would keep a record of all Committee meetings. This record would be placed in the public docket for this rulemaking. Meetings of the Committee would generally be open to the public.

(L) *Consensus:* The goal of the negotiating process is consensus. FRA proposes that the Committee would develop its own definition of consensus, which may include unanimity, a simple majority, or substantial agreement such that no member will disapprove the final recommendation of the Committee. However, if the Committee does not develop its own definition, consensus shall be unanimous concurrence.

(M) *Notice of Proposed Rulemaking and Final Rule:* The Committee's first objective is to prepare a report containing a notice of proposed rulemaking, preamble, and economic evalutation. If consensus is not obtained on some issues, the report should identify the areas of agreement and disagreement, and explanations for any disagreement. It is expected that participants will address cost/benefit, paperwork reduction, and regulatory flexibility requirements. FRA would prepare an economic assessment if appropriate.

FRA would issue the proposed rule as prepared by the Committee unless it is inconsistent with statutory authority of the agency or other legal requirements or does not, in the agency's view, adequately address the subject matter. If that occurs, FRA would explain the reasons for its decision, or would modify the proposal in a way that allows the public to distinguish modifications from the original proposal.

The Committee would reconvene to review comments received in response to publication of the proposed rule and would negotiate to produce a recommended final rule. FRA would issue the recommended final rule as prepared by the Committee unless it is inconsistent with statutory authority of the agency or other legal requirements or does not, in the agency's view, adequately address the subject matter. If that occurs, FRA would explain the reasons for its decision, or would modify the recommended final rule in a way that allows the public to distinguish modifications from the recommended final rule.

(N) *Key Issues for Negotiation:* FRA has reviewed correspondence, petitions, injury data, existing railroad operating practices, and has engaged in extensive dialogue concerning the protection of roadway workers. Based on this information and rulemaking requirements, FRA has tentatively identified major issues that should be considered in this negotiated rulemaking. Other issues related to roadway protection not specifically listed in this Notice may be addressed as they arise in the course of the negotiation. Comments are invited concerning the appropriateness of these issues for consideration and whether other issues should be added.

1. Are devices available that may be used to reduce the risk of danger to roadway workers? If so, how do these devices work and what are the costs associated with them?

2. Are there appropriate procedures or operating practices that may be instituted effectively to reduce the risk of danger to roadway workers? If so, what are the costs that will be associated with implementing these practices and procedures?

3. Are there appropriate training programs that may be given to reduce the risk of danger to roadway workers? If so, at what intervals should they be taught? Also, what are the costs and the time associated with such a program?

4. Are there peculiar topographical, environmental, and operational conditions that must be considered in developing a program to reduce the risk

of harm to roadway workers? What are the specific conditions, and how do they vary from one region to another, and from one railroad to another? What would the cost for this program be?

5. Should any program developed vary according to the size of a railroad? If so, explain why such variations are necessary and how the programs should differ.

6. What recordkeeping and reporting requirements, if any, should be instituted to advance the safety of roadway workers? What is the amount of time and cost involved with these requirements?

7. What enforcement procedures should FRA utilize to ensure compliance with any rule developed?

8. Aside from the obvious benefit of providing safer working conditions and so reducing the risk of injury and death for roadway workers, are there additional benefits (both monetary and non-monetary) that will result from the implementation of a rule concerning roadway workers?

9. Do any railroads currently have internal operating practices that address the intended purposes of this negotiated rulemaking? If so, please provide the background for implementation of these practices, and a description of their effectiveness. Also, what were the costs and benefits associated with implementing these practices?

### IV. Public Participation

FRA invites comments on all issues, procedures, guidelines, interests, and suggested participants embodied in this Notice. All comments and requests for participation should be submitted to the Docket Clerk, Office of Chief Counsel, FRA, 400 Seventh Street, SW., Room 8201, Washington, DC 20590.

Issued this 11th day of August 1994.

**Jolene M. Molitoris,**

*Administrator.*

[FR Doc. 94-20078 Filed 8-16-94; 8:45 am]

BILLING CODE 4910-06-P

## 60 Fed. Reg. 1761 (Jan. 5, 1995)

**DEPARTMENT OF TRANSPORTATION**

**Federal Railroad Administration**

**49 CFR Part 214**

**[FRA Docket No. RSOR 13, Notice No. 2 RIN 2130–AA86]**

### Roadway Worker Protection

**AGENCY:** Federal Railroad Administration (FRA); DOT.

**ACTION:** Notice of establishment of advisory committee for regulatory negotiation session and notice of first meeting.

**SUMMARY:** The Federal Railroad Administration is announcing the establishment of an advisory committee to develop a report including a recommended proposed rule concerning the protection of railroad employees who work on or adjacent to track and face the risk of injury from moving trains and equipment. The committee will adopt its recommendation through a negotiation process. The committee is composed of persons who represent interests affected by any rule adopted on this issue. This notice also announces the time and place of the first advisory committee meeting.

**DATES:** The first meeting of the advisory committee will begin at 9:30 a.m. on January 23–25, 1995.

**ADDRESSES:** The first meeting of the advisory committee will be held in Room 3200–3204 of the Nassif Building, U.S. Department of Transportation, 400 7th Street, SW., Washington, DC. Subsequent meetings will be held at locations to be announced.

**FOR FURTHER INFORMATION CONTACT:** Christine Beyer or Cynthia Walters, Trial Attorneys, Office of Chief Counsel, FRA, 400 Seventh Street, SW., Room 8201, Washington, DC 20590 (Telephone: 202–366–0621).

**SUPPLEMENTARY INFORMATION:**

### I. Background

The Rail Safety Enforcement and Review Act, Pub. L. No. 102–365, 106 Stat. 972, enacted September 3, 1992, required FRA to review and revise its track safety standards, and to complete "an evaluation of employee safety." FRA issued an Advance Notice of Proposed Rulemaking (ANPRM) on November 16, 1992 (57 FR 54038) to begin the proceeding to amend the Federal Track Safety Standards (49 C.F.R. Part 213). Following publication of the ANPRM, FRA conducted a series of workshops to gather the industry's views on the need for changes to FRA's track regulations. One such workshop

**1762**

held on March 31, 1993 was devoted specifically to employee safety and addressed the hazards associated with working adjacent to moving trains and equipment. It was determined that for the purposes of any proceeding, the term "roadway worker" would be used rather than "maintenance of way employee" to describe the group of employees at risk. This term encompasses all employees of a railroad or a contractor to a railroad who construct, maintain, ~~inspect,~~ or repair railroad tracks, structures, signal and train control systems, communication systems, utility systems, or any other fixed property of a railroad while in close or potentially close proximity to tracks on which trains or equipment can be operated. The term applies regardless of the craft or class title of the employee, affiliation with any labor organization, or rank within the railroad organization.

Because FRA decided that this issue should be addressed quickly and because the hazards involved relate more closely to employee safety than to track standards, FRA moved roadway worker safety from the track safety standard review (FRA Docket No. RST–90–1) and placed it in FRA Docket No. RSOR 13.

Since 1989, 24 roadway workers have been fatally injured by moving trains or equipment. Ten workers were struck by trains while performing work, four were struck by trains on track adjacent to the work location, five stepped into a train's path, and five were struck by maintenance-of-way equipment. These fatalities are among the following crafts: signal maintainers, machine operators, welders, track foremen, track inspectors, and track laborers. These figures reflect a serious problem that may require changes in railroad operating rules, training and practices. In the past year, the Brotherhood of Maintenance of Way Employes and the Brotherhood of Railroad Signalmen have filed petitions for emergency order and rulemaking that suggest procedures to reduce roadway worker fatalities and injuries.

On June 3, 1994 FRA Administrator Jolene M. Molitoris convened a meeting with all affected industry representatives to discuss what actions the industry and the agency should take to prevent injuries and fatalities among roadway workers. FRA and the industry concluded that extensive input from all interested parties would be necessary to develop a rule that will address both the risk of injury from moving railroad equipment and the operational concerns that the issue presents. Therefore, it was determined that the agency should initiate a negotiated rulemaking to develop new standards to protect roadway workers.

On August 17, 1994 FRA published a notice of intent to establish an advisory committee (Committee) for regulatory negotiation to develop a report including a recommended proposed and final rule concerning protection for roadway workers (59 FR 42200). The notice requested comment on membership, the interests affected by the rulemaking, the issues the Committee should address, and the procedures it should follow. The notice also announced the intent to seek the services of a professional neutral to facilitate the negotiations and requested nominations for this position from the industry.

FRA received over 30 comments on the notice of intent. None of the comments opposed using regulatory negotiation for this rulemaking; most endorsed the process and included requests to serve on the Committee. Based on this response and for the reasons stated in the notice of intent, FRA has determined that establishing an advisory committee on this subject is necessary and in the public interest. In accordance with Section 9(c) of the Federal Advisory Committee Act, 5 U.S.C. App. I § 9(c), FRA prepared a Charter for the establishment of the Roadway Worker Safety Advisory Committee. On December 27, 1994 the Office of Management and Budget approved the Charter, authorizing the Committee to begin negotiating the provisions of a proposed rule.

## II. Mediators

In the notice of intent, FRA stated that it was seeking an impartial mediator to conduct the negotiations. FRA is pleased to announce that the Federal Mediation and Conciliation Service (FMCS) has agreed to provide mediation personnel for this purpose.

## III. Membership

In addition to a representative from FRA, the Committee will consist of the following members:

American Public Transit Association (APTA)
The American Short Line Railroad Association (ASLRA)
Association of American Railroads (AAR)
Brotherhood of Locomotive Engineers (BLE)
Brotherhood of Locomotive Engineers, American Train Dispatchers Department (ATDA)
Brotherhood of Maintenance of Way Employes (BMWE)
Brotherhood of Railroad Signalmen (BRS)

Burlington Northern Railroad (BN)
Consolidated Rail Corporation (Conrail)
CSX Transportation, Inc. (CSX)
Florida East Coast Railway Company (FEC)
Metra
National Railroad Passenger Corporation (AMTRAK)
Norfolk Southern Corporation (NS)
Regional Railroads of America (RRA)
Transport Workers Union of America (TWU)
Union Pacific Railroad Company (UP)
United Transportation Union (UTU)

In order to ensure balance on the Committee, the BMWE and BRS will be represented by more than one individual: five for the BMWE and three for the BRS. FRA was not able to grant requests for multiple seats made by two other organizations. APTA and RRA each submitted two names for membership, and FRA chose one name from each organization. In making those decisions, the agency selected the individuals with operating experience rather than the lawyers that were nominated by APTA and RRA. FRA believes that the Committee will benefit greatly from members who have actual knowledge of railroad operating practices and hands-on field experience with those practices.

FRA regrets being unable to accommodate all requests for membership on the Committee. Several factors, which were listed in the notice of intent, guided FRA's decision to limit the Committee's size to 25. The Committee must be kept to a size that permits effective negotiation, but that ensures all interests a voice in the recommendation adopted. Although FRA would have preferred a smaller Committee, the agency erred on the side of inclusion to be certain that all interests affected by a rule would be represented in this process. Summarized below is FRA's rationale for denying the remaining applications for membership.

The Chicago and North Western Railway Company (CNW) requested representation on the Committee, but unfortunately could not be selected. Other Class 1 railroads on the Committee work with operating procedures, environmental conditions, topographical characteristics, and employee relations that are quite similar to those of CNW. Each of these factors may impact the content of a recommended proposed rule and so it is important that they be fully represented. However, FRA believes that AAR, BN, CSX, Conrail, NS, and UP adequately represent CNW's interests.

1763

The Massachusetts Bay Transportation Authority (MBTA) petitioned for membership on the Committee, but was not selected. MBTA is a commuter line in the northeast with operational characteristics that are very similar to those of Amtrak, a Committee member. Also, APTA's Committee member will represent all commuter lines in this proceeding. Therefore, FRA believes that MBTA's interests will be adequately represented by the other commuter rail organizations on the Committee.

The Long Island Rail Road (LIRR) requested Committee membership and nominated its Executive Director of System Safety to serve as its representative. Although FRA was not able to select LIRR for Committee membership, its nominee will serve on the Committee representing the interests of APTA and all public transit organizations. Therefore, LIRR's interests will be effectively considered during the negotiation process.

The Wisconsin Central Ltd. (WC) requested representation on the Committee and nominated its Vice President of Engineering to represent its interests. This individual was also nominated to represent RRA. FRA was unable to select WC individually, but its nominee has been chosen to represent RRA and all regional railroads. Therefore, WC's interests will be adequately addressed in the negotiation process.

Finally, the National Railroad Construction and Maintenance Association, Inc. (NRCMA) filed a request for membership jointly with RRA, and nominated its Executive Vice

President to represent the interests of NRCMA and RRA. As indicated above, RRA filed a second application for representation asking that WC's Vice President of Engineering also represent their interests. As already stated, this individual has been chosen to represent RRA (and WC implicitly) because he brings extensive hands-on experience to the proceeding. FRA deliberated over NRCMA's application, and determined that its interests will be effectively represented by the railroads and labor organizations on the Committee who currently have primary responsibilities for protecting roadway workers. NRCMA's duties derive from and are subject to those of the railroads with whom they contract for maintenance and construction work. Given the limitations the agency faces in creating a Committee of reasonable size, and the broad spectrum of railroads and employee crafts represented on the Committee, FRA believes that NRCMA's interests will be effectively addressed in this process. Also, public participation will be a key component of this process; all Committee meetings will be open to the public, and the Committee is expected to devise procedures that will periodically permit comment from the public. FRA will hold a public hearing after issuing a proposed rule, and will invite and consider comments from organizations such as the NRCMA before promulgating any final standard.

### IV. Participation by Non-Members

FRA believes that public participation is critical to the success of this proceeding. Participation is not limited to Committee members. Negotiation sessions will be open to the public, so interested parties may observe the negotiations and communicate their views in the appropriate time and manner to Committee members. Also, interested groups or individuals may have the opportunity to participate with working groups of the Committee. FRA believes that this sort of participation will produce meaningful information and lead to a more effective roadway worker safety program. Of course, FRA will invite comment on the proposed rule resulting from the Committee's deliberations and hold a public hearing to hear additional comments.

### V. Major Issues

In its notice of intent, FRA tentatively identified major issues to consider in the negotiation and asked for comment on whether the issues presented were appropriate and if alternate or additional issues should be considered. Unfortunately, most comments submitted were devoted to issues of membership rather than rule substance. Listed below are subjects FRA believes the negotiation process should address:

1. Devices available that would reduce the risk of injury to roadway workers;
2. Practices and training programs currently in use or that may be instituted to reduce the risk of injury to roadway workers;
3. The extent to which environmental, topographical, and operational conditions do or should cause variations in any roadway worker safety program;.
4. The type and extent of FRA enforcement and recordkeeping requirements necessary to protect roadway workers; and
5. The costs associated with developing an effective roadway worker safety program. (The costs include but are not limited to the burden on railroads and local, state, and federal government entities.)

FRA believes that the negotiation process should be open to discussion about these and any other relevant matters the Committee finds necessary to explore.

### VI. Procedure and Schedule

Those who commented on the notice of intent generally did not address Committee procedures. FRA anticipates that all or a substantial majority of the negotiation sessions will take place in Washington, D.C. at DOT headquarters. Given FRA's limited resources, travel outside of Washington, D.C. for the purpose of holding negotiation sessions is unlikely. However, FRA will consider any recommendations made by the Committee in this regard.

FRA will not make any determinations at this time concerning the frequency or timing of public hearings, or the development of negotiation subcommittees. FRA's ability to hold public hearings will be subject to the availability of funds for this purpose. However, FRA will consider any recommendations the Committee makes on these matters.

Consistent with requirements of the Federal Advisory Committee Act, a clear and comprehensive record of the Committee's deliberations should be kept and circulated to Committee members. FRA will provide an administrative specialist to the Committee to complete these duties and assist with drafting any additional documents, including the Committee's report. The Committee may also choose to designate additional individuals to draft documents.

The objective of the negotiation, in FRA's view, is for the Committee to produce a report recommending a course of action for FRA to follow that will prevent roadway worker injuries and fatalities. FRA anticipates that the report will include a draft NPRM on which the Committee has reached consensus. This approach is consistent with recommendations of the Administrative Conference of the United States on regulatory negotiation. As stated in the notice of intent, FRA will proceed on its own if the Committee cannot reach consensus on a recommended course of action. In that event, FRA will make every attempt to include provisions that the Committee did reach agreement on in the agency's NPRM. Also, as stated in the notice of intent, FRA must review the Committee's recommendations for enforceability and effectiveness. If the agency determines that the report contains recommendations which are unenforceable, contrary to existing law, or completely ineffective, FRA may abandon or amend the Committee's recommendations. However, we believe likelihood of such a situation is remote, and will seek to avoid this result.

In view of the high priority FRA has given this proceeding and the facilitation contract limitations, the agency is asking the advisory committee to complete negotiations for the NPRM by May 1, 1995. FRA realizes that this deadline is ambitious, but we believe that it will encourage serious and efficient negotiation by all parties.

The negotiation process will otherwise proceed according to a schedule of specific dates that the Committee devises at the first meeting to be held on January 23–25, 1995. As time permits, FRA will publish notices of future meetings in the **Federal Register**. The first meeting is scheduled to begin at 9:30 a.m. in Room 3200–3204 of the Nassif Building, DOT headquarters. This session will commence with an orientation and regulatory negotiation training program conducted by facilitators from the Federal Mediation and Conciliation Service. After the training program, the Committee will devise its procedures and calendar, and will then begin substantive deliberations on roadway worker safety. FRA has given advance notice of this meeting to all Committee members and believes that all members will be present for this first and important meeting.

Issued this 29th day of December, 1994

**S. Mark Lindsey,**

*Acting Administrator, Federal Railroad Administration.*

[FR Doc. 95–201 Filed 1–4–95; 8:45 am]

BILLING CODE 4910–06–P

## 52 Fed. Reg. 21788 (June 9, 1987)

**DEPARTMENT OF TRANSPORTATION**

**Office of the Secretary**

**Advisory Committee for Regulatory Negotiation Concerning Nondiscrimination on the Basis of Handicap in Air Travel; Meetings**

**AGENCY:** Department of Transportation, Office of the Secretary.

**ACTION:** Notice; Schedule of Advisory Committee Meetings.

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**SUMMARY:** The Department of Transportation gives notice, as required by the Federal Advisory Committee Act (Pub. L. 92–463), that meetings of its Advisory Committee on Regulatory Negotiation (concerning nondiscrimination on the basis of handicap in air travel) will meet during 1987 on the dates listed below.

**DATES:** Meetings of the Advisory Committee are scheduled on the following dates:

Wednesday, June 10
Tuesday, June 16
Tuesday, June 23
Thursday, July 9
Wednesday, July 22
Thursday, July 23
Monday, August 10
Tuesday, August 11
Thursday, August 20
Wednesday, September 2
Thursday, September 3
Wednesday, September 9
Thursday, September 10
Wednesday, September 23
Monday, October 5
Tuesday, October 6
Thursday, October 15
Friday, October 16
Monday, October 26
Monday, November 2
Tuesday, November 3
Thursday, November 5

**ADDRESSES:** The June 10 meeting will be held in Room 3200 of the Department of Transportation's headquarters building, located at 400 7th Street, SW., Washington DC. The June 16 meeting will be held at the Endependence Center of Northern Virginia, 2111 Wilson Blvd., Suite 400, Arlington, Virginia. The June 23 meeting will be in room 8236 of the DOT building. Locations of subsequent meetings will be announced in a later notice. It is expected that most of these meetings will take place at the DOT headquarters building.

**FOR FURTHER INFORMATION CONTACT:** Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, 400 7th Street, SW, Room 10424, Washington, DC, 20590. 202–366–9306 (voice); 202–755–7687 (TDD).

**SUPPLEMENTARY INFORMATION:** The listed meetings of the advisory committee are for the purpose of negotiating the contents of a proposed regulation that be issued by the Department of Transportation to implement the Air Carrier Access Act of 1986, which prohibits discrimination on the basis of handicap in air travel. The meetings are open to the public. The Department requests that individuals planning to attend any of the meetings who will need the services of a sign language interpreter so inform the Department at least two days in advance of the meeting date. Interested persons may contact Mr. Ashby for this purpose.

Issued this day of June, 1987, at Washington, DC.

**Rosalind A. Knapp,**
*Deputy General Counsel.*

**Gloria Jean Gladden,**
*Alternate Certifying Officer.*

[FR Doc. 87–13206 Filed 6–5–87; 3:28 pm]

BILLING CODE 4910–62–M

57 Fed. Reg. 61860 (Dec. 29, 1992)

Department of Labor

Occupational Safety and Health Administration

29 CFR Part 1926

[Docket No. S-775]

RIN No. 1218–AA65

## Safety Standards for Steel and Other Metal and Non-Metal Erection

**AGENCY:** Occupational Safety and Health Administration (OSHA), U.S. Department of Labor.

**ACTION:** Announcement of Intent To Establish Negotiated Rulemaking Committee; Request for Representation.

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**SUMMARY:** The Occupational Safety and Health Administration is announcing its intent to establish a Steel Erection Negotiated Rulemaking Advisory Committee under the Negotiated Rulemaking Act (NRA) and the Federal Advisory Committee Act (FACA). The Committee will negotiate issues associated with the development of a proposed revision of the existing safety provisions in its construction standards for steel erection (29 CFR part 1926, subpart R). The Committee will include representatives of identified parties who would be significantly affected by the final rule. OSHA solicits interested parties to nominate representatives for membership for representation on the Committee.

**DATES:** OSHA must receive written comments and requests for membership or representation by March 29, 1993.

**ADDRESSES:** All written comments should be sent, in quadruplicate, to the following address: Docket Office, Docket S–775, Room N–2625, 200 Constitution Ave., N.W., Washington, D.C., 20210; Telephone (202) 219–7894.

Nominations for membership or representation on the Committee should be sent, in quadruplicate, to the Docket Office, Docket S–775, U.S. Department of Labor, Occupational Safety and Health Administration, Room N–2625, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

**FOR FURTHER INFORMATION CONTACT:** Mr. James F. Foster, OSHA, U.S. Department of Labor, Office of Information and Consumer Affairs, Room N–3647, 200 Constitution Avenue, N.W., Washington, D.C. 20210; Telephone: (202) 219–8151.

**SUPPLEMENTARY INFORMATION:**

### I. Background

Existing subpart R of part 1926 (§§1926.750 through 1926.752) contains the safety standards that apply specifically to steel erection activities. The subpart was adopted in 1971 as an OSHA standard under section 6(a) of the OSH Act, which authorized the Agency to adopt established Federal standards issued under other statutes, including the Construction Safety Act (40 U.S.C. 333). Since 1971, the steel erection standard has been amended several times. For example, in 1972, OSHA promulgated miscellaneous amendments and in 1974, the Agency revised the temporary flooring requirement.

Since 1974, OSHA has received several requests for clarification of various provisions of subpart R, especially regarding the fall protection requirements. In 1984, the Agency began drafting a proposed rule to update and clarify subpart R. On several occasions, in meetings with its Advisory Committee on Construction Safety and Health (ACCSH), OSHA presented draft regulatory language revising subpart R and sought the Committee's advice.

On November 25, 1986, OSHA issued a Notice of Proposed Rulemaking (NPRM) for subpart M (Fall Protection) at 51 FR 42718. In that document the Agency announced that it intended the proposed fall protection rule to apply to all walking/working surfaces found in construction, except for certain specific areas where other sections in the construction standards would continue to apply. With regard to steel erection activities, the Agency provided in proposed §1926.500(a)(2)(iv) that: "Requirements relating to fall protection for connectors performing steel erection and requirements for fall protection for workers on derrick and erection floors during steel erection are provided in 29 CFR 1926.750—1926.752 ([s]ubpart R)." Also, in proposed §1926.500(a)(3)(iii) the Agency provided that: "Specific requirements for safety railings used on derrick and erection floors during steel erection are provided in 29 CFR 1926.752 ([s]ubpart R)."

In the preamble to the fall protection rule, OSHA summarized the meaning of these exceptions by stating that "additional requirements to have fall protection for connectors and for workers on derrick and erection floors during steel erection would remain in [s]ubpart R—Steel Erection" (51 FR 42720, Nov. 25, 1986). This statement led to confusion in the steel erection industry. In response, OSHA extended the comment period for submissions on the issue and stated that it "intend(ed) that the proposed fall protection standards published on November 26, 1986, apply to all workers engaged in skeleton steel erection activities, except for connectors...making initial connections..." (52 FR 20616, June 2, 1987). Subsequently, OSHA announced (53 FR 2048, 2053, January 26, 1988) "that the consolidation of the fall protection provisions in subpart M [would] not apply to steel erection and that the current fall protection requirements of part 1926 [would] continue to cover steel erection until [a] steel erection rulemaking is completed."

OSHA continued to work on its subpart M rulemaking and to develop a draft proposed revision to subpart R. As part of that process, the Agency presented several draft proposed revisions of subpart R to the ACCSH and solicited the Committee's input. Overall, OSHA has received many recommendations from the ACCSH and affected employee and employer parties, several of which have requested that OSHA institute negotiated rulemaking to help develop a new subpart R proposal. OSHA initially denied the requests for negotiated rulemaking because it was about to issue a proposed revision of subpart R. However, in an effort to ensure that OSHA's proposal on subpart R would more fully address the concerns of the affected groups, OSHA asked an independent consultant to review the fall protection issues raised by the draft revisions of subpart R, render an independent opinion and to recommend a course of action. The consultant recommended that OSHA address the issue of fall protection as well as other potential revisions of subpart R by using the negotiated rulemaking process.

Based on the consultant's findings and the continued requests for negotiated rulemaking, OSHA has decided to use the negotiated rulemaking process to develop a proposed revision of subpart R that will cover fall protection for erectors as well as technical requirements for the assembly and installation of structures. To facilitate access to pertinent information, all transcripts and documents generated regarding subpart R and all relevant materials from the rulemaking records for the proposed revision to subparts L (S–205), M (S–206), and X (S–207) have been made part of the docket for this proceeding (S–775).

The negotiated rulemaking effort described in this Notice will be conducted in accordance with the Department of Labor's recently approved policy on negotiated rulemaking. For further detail about the Department's negotiated rulemaking policy, please consult the "Notice of Policy on Use of Negotiated Rulemaking Procedures by Agencies of the Department of Labor" being published in the Federal Register concurrently with this Notice.

*A. The Concept of Negotiated Rulemaking*

Usually, OSHA develops a proposed rule using staff and consultant resources. The concerns of affected parties are identified through various informal contacts, such as the circulation of a draft proposal to known affected parties for their informal comment, advance notices of proposed rulemaking (ANPR) published in the Federal Register or through formal consultation with an advisory committee such as the ACCSH. After a notice of proposed rulemaking is published for comment, affected parties, including the Agency, submit arguments and data supporting their positions. All communications from affected parties are directed to the agency and its docket office. In general, there is not much communication during the rulemaking among parties representing different interests, except during cross-examination conducted at a rulemaking hearing.

Many times, effective regulations have resulted from such a process. However, as Congress noted in the Negotiated Rulemaking Act (5 U.S.C. 561), current rulemaking procedures "may discourage the affected parties from meeting and communicating with each other, and may cause parties with different interests to assume conflicting and antagonistic positions..." (Sec. 2 (2)). Congress also stated that "(a)dversarial rulemaking deprives the affected parties and the public of the benefits of face-to-face negotiations and cooperation in developing and reaching agreement on a rule. It also deprives them of the benefits of shared information, knowledge, expertise, and technical

abilities possessed by the affected parties." (Sec. 2 (3)).

Using negotiated rulemaking to actually develop a proposed rule is fundamentally different. Negotiated rulemaking is a process by which a proposed rule is developed by a committee composed of representatives of all the interests that will be significantly affected by the rule. Decisions are made by consensus, which generally requires concurrence among all of the interests represented.

The process is started by the Agency's careful identification of all interests potentially affected by the rulemaking under consideration. To help in this identification process, the Agency publishes a document in the Federal Register such as this one, which identifies a preliminary list of interests and requests public comment on that list.

Following receipt of the comments, the Agency establishes an advisory committee representing these various interests to negotiate a consensus on the provisions of a proposed rule. Representation on the committee may be direct, that is, each member represents a specific interest, or may be indirect, through coalitions of parties formed to represent a specific sphere of interest. The Agency is a member of the committee representing the Federal government's own set of interests.

The negotiated rulemaking (reg/neg) advisory committee is chaired by a trained mediator who facilitates the negotiation process. The role of this mediator, also called a facilitator, is to apply proven consensus building techniques to the OSHA advisory committee setting. The many functions that he or she will perform are discussed below.

Once a reg/neg advisory committee reaches consensus on the provisions of a proposed rule, the Agency, consistent with its legal obligations, uses such consensus as the basis for its proposed rule, to be published in the Federal Register. This provides the required public notice and allows for a public comment period. Other participants and other interested parties retain their rights to comment, participate in an informal hearing (if requested) and judicial review. OSHA anticipates, however, that the pre-proposal consensus agreed upon by this Committee will effectively narrow the issues in the subsequent rulemaking to only those which truly remain in controversy.

### *B. Selecting subpart R as a Candidate for Negotiated Rulemaking*

The NRA allows the Agency to establish a negotiated rulemaking committee if it is determined that the use of the negotiated rulemaking procedure is in the public interest. As discussed above (in the Background part of this document) OSHA has made such a determination.

OSHA bases this determination, not only on the independent consultant's recommendations as mentioned above, but also on its own prior experience with the negotiated rulemaking process. Even before the NRA was enacted, OSHA conducted negotiated rulemaking for its complex health standards for Methylenedianiline (MDA). This committee met seven times over a 10-month period (24 meeting days) and successfully negotiated standards for both general industry and construction. The final standards were ultimately based on the recommended proposed standards, and no litigation followed the standards' promulgation.

In addition, extensive discussions held between OSHA staff and many interested parties lends further evidence that the elements necessary for a successful negotiated rulemaking on steel erection exist. Moreover, the Agency believes that most of the selection criteria listed in the NRA (5 U.S.C. 563(a)) are met. There is a recognized need to revise subpart R to clarify fall protection requirements for structural erection workers and to update construction specifications and work practices. Interests which will be affected by a revised subpart R are known, are limited in number, and to a significant degree, are already organized in interest-based coalitions. Parties representing significant interests have requested that OSHA begin negotiated rulemaking on a revised subpart R. The Agency believes that reaching consensus on revised work practices and specifications for structural erection is highly promising. In addition, OSHA expects that all persons likely to be significantly affected by such a rule also will negotiate in good faith, on the fall protection provisions of a proposed standard. The need for clarification and revisions of current fall protection provisions is acknowledged by all known interests.

### *C. Agency Commitment*

In initiating this negotiated rulemaking process, OSHA is making a commitment on behalf of the Department of Labor that the agency and all other participants within the Department will provide adequate resources to ensure timely and successful completion of the process. This commitment includes making the process a priority activity for all representatives, components, officials, and personnel of the Department who need to be involved in the rulemaking, from the time of initiation until such time as a final rule is issued or the process expressly terminated. Once the process has been initiated, all representatives, components, officials, and personnel of the Department shall be expected to act in accordance with this commitment.

As provider of administrative support, OSHA will take steps to ensure that the negotiated rulemaking committee has the dedicated resources it requires to complete its work in a timely fashion. These include the provision or procurement of such support services as: properly equipped space adequate for public meetings and caucuses; logistical support and timely payment of participant travel and expenses where necessary as provided for under the NRA; word processing, information dissemination, storage and other information handling services required by the committee; the services of a facilitator; and such additional statistical, economic, health, safety, legal, computing or other technical assistance as may be necessary.

OSHA, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the Committee as the basis for the rule proposed by the Agency for public notice and comment. The Agency believes that by clarifying and updating the existing standards, it can limit or reduce the number of deaths and injuries to employees engaged in structural erection who are exposed to a significant risk of injury and death because of the outdatedness and lack of clarity of certain current provisions in subpart R. The Agency, therefore, is committed to publishing a consensus proposal that is consistent with OSHA's legal mandates.

*D. Negotiating Consensus*

As discussed above, the negotiated rulemaking process is fundamentally different from the usual development process for OSHA proposed rules. Negotiation allows all the parties to discuss possible approaches to various issues rather than only asking them to respond to details of an OSHA proposal. The negotiation process involves a mutual education of the parties by each other on the practical concerns about the impact of such approaches. Each committee member participates in resolving the interests and concerns of other members, rather than leaving it up to OSHA to bridge different points of view.

A key principle of negotiated rulemaking is that agreement is by consensus of all the interests. Thus, no one interest or group of interests is able to control or dominate the process. The NRA defines consensus as the unanimous concurrence among interests represented on a negotiated rulemaking committee, unless the committee itself unanimously agrees to use a different definition. In addition, experience has demonstrated that using a trained mediator to facilitate this process will assist all potential parties, including OSHA, to identify their real interests in the rule and so be able to reevaluate previously stated positions on issues involved in this rulemaking effort.

*E. Some Key Issues for Negotiation*

OSHA expects the key issues to be addressed as part of these negotiations will include:

1. *Scope and application:* Should the scope of subpart R be limited to the erection of steel or should it cover other materials as well? Should it be limited to the construction of single and multi-story buildings or apply as well to other types of structures such as bridges, metal tanks and non-power transmission towers?

2. *Construction specifications and work practices:* Which construction specifications and/or work practices provide adequate protection for employee safety for steel erection? What other specifications and practices should be included to provide protection for employee safety during the erection of non-steel structures? Would it be appropriate to limit the use of one-bolt connections? What rule is necessary regarding column stability? Should tandem ("christmas tree") loading and hoisting of structural members on the same (crane) hook be restricted? If so, how? What requirements should be set for double connections?

3. *Written construction safety erection plan:* Should OSHA require a written safety erection plan including construction specifications and safety provisions before the actual erection of the structures may start? What should be the required component parts of such a plan?

4. *Fall protection:* (a) To what extent should the fall protection provisions of proposed subpart M apply to steel, non-steel metal and non-metal erectors? Are

there circumstances under which employees, who perform initial connections of structural components or other erection work, should be exempted from the requirements of subpart M? What are those circumstances? To what extent do alternative safeguards such as training and special designations adequately protect connectors or other erection workers from fall hazards? What are the advantages and disadvantages for employee safety of using fall protection devices and systems such as body belt systems, body harness systems and safety net systems?

(b) What costs are associated with providing fall protection to erectors? To what extent do employers who provide fall protection reduce their costs, such as through lower insurance and workers compensation premiums? How would productivity, for example, measured in terms of the time required to erect a completed structure, differ according to the fall protection strategy chosen?

(c) To what extent do non-steel structural erectors have concerns about the feasibility of compliance with the fall protection provisions of proposed subpart M? What fall protection requirements would provide appropriate protection for employees erecting non-metal structures? Should the same fall protection provisions apply to all structural erectors, including steel and non-metal structure erectors?

## II. Proposed Negotiation Procedures

The following proposed procedures and guidelines may be augmented as a result of comments received in response to this document or during the negotiation process

### *A. Committee Formation*

This negotiated rulemaking Committee will be formed and operated in full compliance with the requirements of the Federal Advisory Committee Act (FACA) in a manner consistent with the requirements of the Negotiated Rulemaking Act (NRA)

### *B. Interests Involved*

The Agency intends to conduct negotiated rulemaking proceedings with particular attention to ensuring full and adequate representation of those interests that may be significantly affected by the proposed rule. Section 562 of the NRA defines the term "interest" as follows:

> (5) "interest" means, with respect to an issue or matter, multiple parties which have a similar point of view or which are likely to be affected in a similar manner

The following interests have been tentatively identified as "significantly affected" by the matters that may be included in the proposed rule:

--Architectural, design and engineering firms.

--Developers, property owners and general contractors;

--Erection contractors using steel and erection contractors using materials other than steel;

--Fabricators of structural steel and non-steel metal products;

--Insurance organizations and public interest groups;

--Labor organizations representing employees who perform erection work;

--Manufacturers and suppliers of fall protection safety equipment;

--Manufacturers and suppliers of structural members and pre-engineered components; and

--Government entities.

One purpose of this document is to determine whether a standard regulating erection operations associated with steel and/or other metal and non-metal material members would significantly affect interests that are not listed above. OSHA invites comment and suggestions on this list of "significantly affected" interests

In this regard, the Department of Labor recognizes that the regulatory actions it takes under its programs may at times affect various segments of society in different ways, and that this may in some cases produce unique "interests" in a proposed rule based on income, gender, or other such factors.

Particular attention will be given by the Department to ensure that any unique interests which have been identified in this regard, and which it is determined will be significantly affected by the proposed rule, are fully represented.

*C. Members*

The negotiating group should not exceed 25 members, and 15 would be preferable. The Agency believes that more than 15 members would make it difficult to conduct effective negotiations.

OSHA is aware that there are many more potential participants, whether they are listed here or not, than there are membership slots on the Committee. The Agency does not believe, nor does the NRA contemplate, that each potentially affected group must participate directly in the negotiations; nevertheless, each affected interest will hopefully be adequately represented. In order to have a successful negotiation, it is important for interested parties to identify and form coalitions that adequately represent significantly affected interests. These coalitions, in order to provide adequate representation, must agree to support, both financially and technically, a member to the Committee whom they will choose to represent their "interest

61864

It is very important to recognize that interested parties who are not selected to membership on the Committee can make valuable contributions to this negotiated rulemaking effort in any of several ways:

- The person could request to be placed on the Committee mailing list, making written comment, as appropriate;
- The person could attend the Committee meetings, which are open to the public, caucus with his or her interest's member on the Committee, or even address the Committee (usually allowed at the end of an issue's discussion or the end of the session, as time permits); and/or
- The person could assist in the work of a workgroup which might be established by the Committee.

Informal workgroups are usually established by an advisory committee to assist the Committee in "staffing" various technical matters e.g., researching or preparing summaries of the technical literature or comments on particular matters such as economic issues before the Committee so as to facilitate Committee deliberations. They might also assist in estimating costs and drafting regulatory text on issues associated with the analysis of the affordability and benefits addressed, and formulating drafts of the various provisions and their justifications previously developed by the committee. Given their staffing function, workgroups usually consist of participants who have expertise or particular interest in the technical matter(s) being studied.

Because it recognizes the importance of this staffing work for the Committee, OSHA will provide appropriate technical expertise for such workgroups.

Requests for appointment to membership on the Committee are solicited. Members can be individuals or organizations. If the effort is to be fruitful, participants should be able to fully and adequately represent the viewpoints of their respective interests. Those who wish to be appointed as members of the Committee should submit a request to OSHA, in accordance with the Public Participation part of this document.

The following list includes those who have been tentatively identified by OSHA as being either a potential member of the Committee, or a potential member of a coalition that would in turn nominate a candidate to represent one of the significantly affected interests listed above:

*Architectural, design, and engineering firms.*

--Representatives of architects/engineers, civil, mechanical, and structural design engineering firms; including engineering schools and universities;

--American Institute of Architects (AIA);

--American Society of Civil Engineers (ASCE); and

--American Society of Safety Engineers (ASSE).

*Developers, property owners, and general contractors:*

--Representatives of builders, developer-owners, and general contractors for construction projects of building structures; bridge structures of railroads, highways, rivers and waterways; power and chemical plants; oil companies; and general managers who hire erector contractors and subcontractors to do structural erection work.

*Builders and contractors associations:*

--Associated General Contractors (AGC);

--Associated Builders and Contractors (ABC); and

--National Constructors Association (NCA).

*Erection contractors using steel and erection contractors using metals other than steel:*

--Representatives of erectors of steel and non-steel metal-framed structures; aluminum, stainless steel, and glass curtain-wall cladding contractors; contractor-erectors of railroad, highway, river and waterway bridge structures;

--National Erectors Association (NEA); and

--Representatives of the structural, ornamental, rigging and reinforcing steel industry.

*Erection contractors using non-metal erection members:*

--Representatives of erectors of precast concrete;

--Representatives of the Precast/Prestressed Concrete Institute (PCI).

--Representatives of erectors of lumber, wood, plastic and other non-metal structures;

--National Association of Home Builders (NAHB).

*Tower project owners, general contractors and erectors:*

--Edison Electric Institute (EEI); and

--Electronic transmission tower erectors and other tower erector contractors.

*Fabricators of structural steel and non-steel metal products:*

--Representatives of fabricators of structural steel, non-steel metal products;

--American Iron and Steel Institute (AISI);

--American Institute of Steel Construction (AISC); and

-Southern Association of Steel Fabricators (SASF).

*Insurance organizations and public interest groups:*

--Representatives of insurance and public interest groups.

*Labor organizations representing employees who perform erection work:*

--International Association of Bridge, Structural and Ornamental Iron Workers Union;

--United Brotherhood of Carpenters and Joiners of America;

--International Brotherhood of Electrical Workers; and

--Laborers International Union of North America.

*Manufacturers and suppliers of safety equipment:*

--Representatives of the manufacturers and suppliers of fall protection equipment; and

--Industrial Safety Equipment Association (ISEA).

*Manufacturers and suppliers of structural members and pre-engineered assemblies components:*

--Representatives of manufacturers and suppliers of structural steel products;

--Representatives of manufacturers and suppliers of aluminum and non-ferrous structural metals;

--Representatives of manufacturers and suppliers of timber and wood structural products, plastic and plastic reinforced structural products; manufacturers of precast concrete structural products; and

--Steel Joist Institute (SJI).

*Government entities:*

--U.S. Department of Labor (DOL)/ Occupational Safety and Health Administration (OSHA);

--Occupational Safety and Health State Plan Association.

--National Institute for Occupational Safety and Health (NIOSH);

--National Aeronautics and Space Administration (NASA);

--Department of the Army, U.S. Army Corps of Engineers;

--Department of Energy (DOE) and Western Area Power Administration (WAPA); and

--Department of Transportation (DOT), including the Federal Railroad Administration (FRA), U.S. Coast Guard (USCG) and the Federal Highway Administration (FHWA).

This list of potential parties is not presented as a complete or exclusive list from which committee members will be selected, nor does inclusion on the list of potential parties mean that a party on the list has agreed or has been selected to participate as a member of the committee or as a member of a coalition. The list merely indicates parties that OSHA has tentatively identified as representing significantly affected interests in the outcome of the subpart R negotiated rulemaking process, and suggests possible coalitions for interested parties to consider. This document gives notice of this process to other potential participants and affords them an opportunity to request representation in the negotiations. The procedure for requesting such representation is set out under the Public Participation part of this document, below. In addition, comments and suggestions on this tentative list are invited.

*D. Good Faith Negotiation*

Committee members should be willing to negotiate in good faith and have the authority to do so. The first step is to ensure that each member has good communications with his or her constituencies. An intra-interest network of communication should be established to bring information from the support organization to the member at the table, and to take information from the table back to the support organization. Second, each organization or coalition should, therefore, designate as its representative an official with credibility and authority to insure that needed information is provided and decisions are made in a timely fashion. Negotiated rulemaking efforts can require a very significant contribution of time by the appointed members that must be sustained for up to a year. Other qualities that can be very helpful are negotiating experience and skills, and sufficient technical knowledge to participate in substantive negotiations.

Certain considerations are central to negotiating in good faith. One is the willingness to bring all issues to the table in an attempt to reach a consensus, instead of keeping key issues in reserve. The second is a willingness to keep the issues at the table and not take them to other forums. Finally, good faith includes a willingness to move away from the type of positions usually taken in a more traditional rulemaking process, and instead explore openly with other parties all ideas that may emerge from the discussions of the committee.

*E. Facilitator*

This individual or organization will not be involved with the substantive development of the standard. Rather, the facilitator's role generally includes:

(1) Chairing the meetings of the committee in an impartial manner;

(2) Impartially assisting the members of the committee in conducting discussions and negotiations;

(3) Performing the duties of the Designated Federal Official under the FACA; and

(4) Acting as disclosure officer for committee records under the Freedom of Information Act (FOIA).

*F. OSHA Representative*

The OSHA representative will be a full and active participant in the consensus building negotiations. The representative will meet regularly with various senior OSHA officials, briefing them on the negotiations and receiving their suggestions and advice, in order to effectively represent their views regarding the issues before the Committee. OSHA's representative will also ensure that the entire spectrum of governmental interests affected by revisions of subpart R, including the

Office of Management and Budget and other Departmental offices, are kept informed of the negotiations and encouraged to make their concerns known in a timely fashion. (OSHA notes that governmental agencies such as the Army Corps of Engineers, which are involved in the construction of steel-framed buildings and structures, have other identifiable interests and expertise that might be represented separately on the Committee.) OSHA's representative will also communicate with the ACCSH on a regular basis, informing it of the status and content of the negotiations.

In addition, the OSHA representative will present the negotiators with the accumulated record evidence gathered on an issue-by-issue basis for their consideration. (The Committee may also consult OSHA's representative with regard to the Agency's regulatory needs, appropriate boundaries of consideration, or technical information. Such information could include the areas of technological feasibility and economic concerns, including direct and indirect costs of compliance.) The OSHA representative, together with the Facilitator, will also be responsible for coordinating the administrative and committee support functions to be performed by OSHA's support team.

### *G. Committee Notice*

After evaluating the comments on this announcement and the requests for representation, OSHA will issue a notice that will announce the establishment of the Committee and its membership, unless after reviewing the comments, it is determined that such an action is inappropriate. The negotiation process will begin once the Committee membership roster is published in the **Federal Register.**

### *H. Tentative Schedule*

Included in the notice establishing the Committee will be a proposed schedule of the meetings. The first meeting will focus largely on procedural matters, including the proposed ground rules. These will also include agreement on dates, times, and locations of future meetings, and identification and determination of how best to address principal issues for resolution.

To prevent delays that might postpone timely issuance of the proposal, after consulting the committee, OSHA intends to terminate the Committee's activities if it does not reach consensus on a proposed rule within 12 months of the first meeting. The process may end earlier if the Facilitator or the committee itself so recommends.

### *I. Record of Meetings*

In accordance with FACA's requirements, the Facilitator will keep minutes and a record of all committee meetings. This record will be placed in the public docket No. S–775 for this rulemaking. Committee meetings will be announced in the **Federal Register** and will generally be open to the public.

### *J. Agency Action*

As noted above, the Agency intends to use the Committee's consensus as the basis for the NPRM. OSHA expects to issue the proposed rule developed by the Committee, unless the consensus is inconsistent with OSHA's statutory authority or is not appropriately justified. In that event, the Agency will explain the reason for its decision.

### *K. Committee Procedures*

Under the general guidance and direction of the Facilitator and subject to any applicable legal requirements, appropriate detailed procedures for committee meetings will be established. Committee members will be presented with proposed ground rules and agendas prior to the first meeting.

## III. Public Participation

Since this will be a negotiated rulemaking, there are many opportunities for an individual who is interested in the outcome of the rule to participate. As a first step in response to this notice of intent to negotiate, OSHA recommends that potential participants take a hard look at the two lists contained in this notice: the lists of significantly affected interests and the lists of potential participants. After analyzing for completeness or over or under-inclusiveness, parties should examine the lists for the purpose of coalition building. Potential parties should try to identify others, whether on the lists or not, who share a similar viewpoint and who would be affected in a similar way by the rule. Communication with these parties of similar interest should follow, and the organization of coalitions to support the interest should begin. It is only after the formation of these coalitions and extensive intra-constituency discussion that decisions should be made as to which individuals should represent the interest and in which capacity. As indicated above, an interested party may participate in a variety of ways such as being a committee member, working within the coalition (promoting communication, providing expert support in a workgroup or otherwise, helping to develop internal ranges of acceptable alternatives, etc.), attending committee meetings in order to caucus with the interest's member or address the Committee at the appropriate times, or submitting written comments or materials.

**61866**

Persons who will be significantly affected by the revision of subpart R, whether or not listed above in this document, may apply for or nominate another person for membership on the committee to represent such interests. Such requests should be submitted, in quadruplicate, to the Docket Office, Docket S–775, U.S. Department of Labor, Occupational Safety and Health Administration, Room N–2625, 200 Constitution Avenue, N.W., Washington, D.C. 20210, no later than March 29, 1993. OSHA notes that the NRA addresses the concerns of potential members for whom the expenses of participation may not be affordable (See 5 U.S.C. 568(c)). Each application or nomination shall include:

(1) The name of the applicant or nominee and a description of the interest such person shall represent;

(2) Evidence that the applicant or nominee is authorized to represent parties having the shared interest the person proposes to represent; and

(3) A written commitment that the applicant or nominee shall actively participate in good faith in the development of the rule under consideration.

All other written comments, including comments on the appropriateness of using negotiated rulemaking to develop a proposed rule to revise the existing safety provisions in 29 CFR part 1926 subpart R, should be directed to Docket No. S–775, and sent in quadruplicate to the following address: OSHA Docket Office, U.S. Department of Labor, Room N–2625, 200 Constitution Ave., N.W., Washington, D.C. 20210; Telephone (202) 219–7894.

## IV. Authority

This document was prepared under the direction of Dorothy L. Strunk, Acting Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20210, pursuant to section 3 of the Negotiated Rulemaking Act of 1990, 104 Stat. 4969, Title 5 U.S.C. 561 *et seq.*

Signed at Washington, D.C., this 21st day of December, 1992.

**Dorothy L. Strunk,**

*Acting Assistant Secretary of Labor.*

[FR Doc. 92–31414 Filed 12–28–92; 8:45 am]

BILLING CODE 4510–26–D

59 Fed. Reg. 24389 (May 11, 1994)

**DEPARTMENT OF LABOR**

**Occupational Safety and Health Administration**

**29 CFR Part 1926**

**[Docket No. S–775]**

**RIN No. 1218–AA65**

## Safety Standards for Steel Erection

**AGENCY:** Occupational Safety and Health Administration (OSHA), U.S. Department of Labor.

**ACTION:** Notice of establishment of Negotiated Rulemaking Committee.

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**SUMMARY:** The Occupational Safety and Health Administration (OSHA) is announcing its decision to establish a Steel Erection Negotiated Rulemaking Advisory Committee under the Negotiated Rulemaking Act (NRA) and the Federal Advisory Committee Act (FACA).

**DATES:** The Charter will be filed on May 27, 1994.

**ADDRESSES:** Any written comments in response to this notice should be sent, in quadruplicate, to the following address: Docket Office, Docket S–775, room N–2625, 200 Constitution Ave., NW., Washington, DC 20210; Telephone (202) 219–7894.

**FOR FURTHER INFORMATION CONTACT:** Mr. James F. Foster, OSHA, U.S. Department of Labor, Office of Information and Consumer Affairs, room N–3647, 200 Constitution Avenue, NW., Washington, DC 20210; Telephone: (202) 219–8151.

**SUPPLEMENTARY INFORMATION:** In accordance with the Federal Advisory Committee Act (Title 5 U.S.C. App. I), section 3 of the Negotiated Rulemaking Act of 1990, Title 5 U.S.C. 561 *et seq.* and after consultation with the General Services Administration (GSA), the Secretary of Labor has determined that the establishment of the Steel Erection Negotiated Rulemaking Advisory Committee is in the public interest in connection with the performance of duties imposed on the Department by the Occupational Safety and Health Act (29 U.S.C. 651 *et seq.*).

The Committee will function as an integral part of the Department's rulemaking on revising safety standards for steel erection. It will attempt, via face-to-face negotiations, to reach consensus on the coverage and the substance of these rules, which can be used as the basis of a Notice of Proposed Rulemaking. The Committee is responsible for identifying the key issues, gauging their importance, analyzing the information necessary to resolve the issues, arriving at a consensus, and submitting to the Secretary of Labor the proposed regulatory text and supporting rationale and documentation for an occupational safety standard governing worker safety during steel erection.

Meetings shall be held, as necessary, at the discretion of the Chairperson, however, no fewer than six meetings shall be held. The Committee will terminate two years from the date of this Charter or until the promulgation of the final standard, whichever is later.

The Committee is composed of no more than 25 members including a facilitator, appointed by the Secretary of Labor, unless the Secretary of Labor determines that a greater number of members is necessary for the functioning of the Committee or to achieve balanced membership. Members may represent the following interests in appropriate balance: Architectural, design, and engineering firms; developers, property owners and general contractors; erection contractors using steel; fabricators of structural steel products; insurance organizations and public interest groups; labor organizations representing employees who perform erection work; manufacturers and suppliers of fall protection safety equipment; manufacturers and suppliers of structural members and pre-engineered components; and government entities.

The Committee will report to the Assistant Secretary for Occupational Safety and Health. It will function solely as an advisory body and in compliance with the provisions of the FACA and the NRA. Its Charter will be filed under the FACA fifteen (15) days from the date of this publication.

Interested persons are invited to submit comments regarding the establishment of the Steel Erection Negotiated Rulemaking Advisory Committee. Any written comments in response to this notice should be sent, in quadruplicate, to the following address: Docket Office, Docket S–775, room N–2625, 200 Constitution Ave., NW., Washington, DC 20210; Telephone (202) 219–7894.

Signed at Washington, DC, this 5th day of May 1994.

**Robert B. Reich,**

*Secretary of Labor.*

[FR Doc. 94–11391 Filed 5–10–94; 8:45 am]

BILLING CODE 4510–26–P

59 Fed. Reg. 25848 (May 18, 1994)

**DEPARTMENT OF LABOR**

**Occupational Safety and Health Administration**

**29 CFR Part 1926**

[Docket No. S–775]

RIN No. 1218–AA65

## Safety Standards for Steel Erection

**AGENCY:** Occupational Safety and Health Administration (OSHA), U.S. Department of Labor.

**ACTION:** Notice of public meeting; Appointment of members to advisory committee; and organizational meeting of advisory committee.

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**SUMMARY:** The Occupational Safety and Health Administration (OSHA) is announcing that a meeting of all parties interested in the Steel Erection Negotiated Rulemaking Advisory Committee (SENRAC) will be held to promote an understanding of the negotiated rulemaking process and to announce the selection of the Advisory Committee.

In addition, immediately following the informational meeting, an organizational meeting of SENRAC will take place. Members will be sworn in and the committee will be charged with its duties and will address certain procedural matters. These meetings will be open to the public.

**DATES:** The public meeting will be held on June 15, 16 and 17, 1994. The informational meeting will begin at 10 a.m. on June 15, and the organizational meeting of the Committee will begin at 1 p.m. on June 16, 1994.

**ADDRESSES:** The public meeting will be held in the Waterford Room on June 15 and 16 and the Haverford Room on June 17 of the Hyatt Regency Hotel in Bethesda, Maryland; Telephone (301) 657–1234.

Any written comments in response to this notice should be sent, in quadruplicate, to the following address: Docket Office, Docket S–775, room N–2625, 200 Constitution Ave., NW., Washington, DC 20210; Telephone (202) 219–7894.

**FOR FURTHER INFORMATION CONTACT:** Mr. James F. Foster, OSHA, U.S. Department of Labor, Office of Information and Consumer Affairs, room N–3647, 200 Constitution Avenue, NW., Washington, DC 20210; Telephone: (202) 219–8151.

**SUPPLEMENTARY INFORMATION:**

### I. Background

Existing subpart R of part 1926 (§§ 1926.750 through 1926.752) contains safety standards that apply specifically to steel erection activities. These provisions include construction specifications, work practices and requirements related to fall protection.

Since 1974, OSHA has received requests for clarification of various provisions of subpart R, especially provisions regarding the fall protection requirements, because other subparts of the construction safety and health standards address fall protection. In 1984, the Agency began drafting a proposed rule to update and clarify subpart R. OSHA met with its Advisory Committee on Construction Safety and Health (ACCSH), and sought the Committee's advice on the draft regulation.

On November 25, 1986, OSHA issued a notice of proposed rulemaking (NPRM) for subpart M (the general fall protection standard for construction work) (51 FR 42718). At that time, the Agency stated that it intended to apply subpart M to certain steel erection activities. Subsequently, the Agency decided (53 FR 2052) that the revised subpart M would not apply when workers were engaged in the erection of steel framed buildings. Instead a separate rulemaking on subpart R would be undertaken. OSHA circulated draft proposals of subpart R reflecting this decision.

In response, several interested parties requested that OSHA institute negotiated rulemaking for subpart R. OSHA retained an independent consultant to review the fall protection issues raised by the draft revisions of subpart R, render an independent opinion and to recommend a course of action. In 1991, the consultant recommended that OSHA address the issue of fall protection as well as other potential revisions of subpart R by using the negotiated rulemaking process.

Based on this recommendation and continued requests for negotiated rulemaking, on December 29, 1992, OSHA published a Federal Register notice of intent to establish a negotiated rulemaking committee (57 FR 61860). The notice requested nominations for membership on the Committee and comments on the appropriateness of using negotiated rulemaking to develop a steel erection proposed rule. In addition, the notice described the negotiated rulemaking process and identified some key issues for negotiation. To promote understanding of this process, OSHA has edited and republished some of these discussions as appendices to this notice.

In response to the notice of intent, OSHA received over 225 submissions from the identified interests, including over 60 nominations for membership on the Committee and several sets of comments. After an evaluation of the submissions, it was apparent that an overwhelming majority of commenters supported this action and OSHA has decided to go forward with the negotiated rulemaking process. The Agency has selected the members of the Committee from these nominations.

The Agency has hired Philip J. Harter, Esq. as Facilitator for the negotiated rulemaking Committee. The primary functions of the Facilitator will be to chair the meetings of the Committee in an impartial manner and assist the members of the Committee in conducting discussions and negotiations.

OSHA has decided that a meeting of all interested parties should be held to promote a better understanding of the negotiated rulemaking process and to initiate the structuring of the negotiations. The meeting will be chaired by the newly appointed Facilitator.

In addition, immediately following the public meeting, an organizational meeting of SENRAC will be held. Members will be sworn in, the committee will be charged with its duties and then will address certain procedural matters, including proposed Ground Rules. Other procedural issues will include agreement on dates, times, and locations of future meetings, and identification and determination of how best to address principal issues for resolution. This meeting will be open to the public.

**II. Agenda for the Public Meeting**

Following registration and assembly, the Facilitator will offer an overview of negotiated rulemaking (Neg/Reg). Interest based negotiation will be contrasted with the usual development of a proposed rule. The advantages of using Neg/Reg, where practical decisionmaking results in a rule that can be more stringent, but, at the same time,

**25849**

easier and less expensive to implement, will be discussed. Other topics addressed will be working with caucuses and the "Wedge" concept, where the member at the table represents a much broader constituency and is expected to funnel information both ways. The very important role of workgroups, composed of both members and other interested parties, working out technical problems and performing drafting and analysis tasks will be discussed. It should be noted that workgroups, while reflecting the deliberations of the Committee, do not make policy decisions. The Facilitator will announce the establishment of an electronic bulletin board for this Neg/Reg. The purpose of the electronic bulletin board is to decrease the amount of paper and paperwork while increasing communication between and among members and the public. During the meeting the Facilitator may provide opportunities for questions and caucus meetings.

The Facilitator will also announce the selection of the Committee. He will discuss: the variety of interests and the potential representatives of those interests; the difficulty in selecting the Committee members and the basis for these selections; and the criteria used in assessing whether to go forward with a Neg/Reg and the decision to go forward in Steel Erection.

The Facilitator will address the matters that must be resolved by the Committee at its first meeting, including the Ground Rules. These are the procedural rules that the Committee will adopt at its first meeting. The Agency will distribute proposed Ground Rules which address: the composition of the Committee, the use of alternates, and the essential commitment of the members to attend the meetings and participate meaningfully. The Ground Rules emphasize the importance of the members' communication with their constituencies including keeping them abreast of the negotiations, thereby limiting surprises. The goal of this negotiated rulemaking is a proposed rule and supporting documentation that all members will support. The Ground Rules will address "bargaining" in good faith to reach the goal.

The Facilitator will also identify and discuss the substantive issues to be resolved by this Committee. Here, the Facilitator is relying on the information presented to him by OSHA as well as the considerable input from the various interests during his convening efforts. The time needed for the resolution of these issues and the order of their consideration is integrally related to the development of a tentative schedule. OSHA requests that all interested parties bring their calendars to facilitate the development of a tentative schedule of committee meetings, site visits and workgroup meetings.

Interactive training sessions, under the direction of the Facilitator, will constitute the final portion of this public meeting. Topics for these training sessions will include the following: a discussion on interest based negotiations; a session illustrating how to participate in a Neg/Reg; and an explanation of how the electronic bulletin board system will aid the negotiation process. Other training activities may be added at the time of the meeting.

### III. Committee Membership

Appointees to the Committee include representatives from labor, industry, public interests and government agencies. The appointees also represent groups interested in, or affected by, the outcome of the rulemaking. SENRAC is comprised of 20 members listed here alphabetically:

Richard Adams, Safety & Occupational Health Office, Department of the Army, U.S. Army Engineers District, Sacramento, Corps of Engineers, Room 960, 1325 "J" Street, Sacramento, CA 95814–2922

William Brown, Ben Hur Construction Company, 13517 Lakefront Drive, St. Louis, MO 63045–1416

Byron R. Chadwick, Regional Administrator, Region VII, Occupational Safety and Health Administration, Federal Building, 1961 Stout Street, Denver, CO 80294

James E. Cole, International Association of Bridge, Structural & Ornamental Iron Workers, Suite 400, 1750 New York Avenue, NW, Washington, DC 20006

Stephen D. Cooper, International Association of Bridge, Structural & Ornamental Iron Workers, Suite 400, 1750 New York Avenue, NW Washington, DC 20006

Phillip H. Cordova, El Paso Crane & Rigging Inc., 1200 Kastrin, El Paso, TX 79907

Perry A. Day, Int'l Brotherhood of Boilermakers, Iron Ship, Builders, Blacksmiths, Forgers & Helpers, Suite 360, 2722 Merrilee Drive, Fairfax, VA, 22031

James R. Hinson, J. Hinson Network, Inc., 1933 Davis St., Suite 268, San Leandro, CA 94577

Richard King, Black & Veatch, P.O. BOX 8405, Kansas City, MO 64114

Jim E. Lapping, Building and Construction Trades, Dept. AFL–CIO, 815 16th Street, NW., Washington, DC 20006

John R. Molovich, United Steelworkers of America, Five Gateway Center, Pittsburgh, PA 15222

Carol Murkland, Gilbane Building Company, Suite 500, 7901 Sandy Spring Road, Laurel, MD 20707

John J. Murphy, Williams Enterprises of Georgia, Inc., P.O. Box 756, Smyrna, GA 30081

Steven L. Rank, Holton & Associates, Ltd., Suite 102, 1850 Craigshire Plaza, St. Louis, MO 63146

Ray Rooth, Division of Occupational Safety and Health, California Department of Industrial Relations, Room 5202, P.O. Box 420603, San Francisco, CA 94142

Al Simmons, Council of Greater New York and Vicinity, International Association of Bridge, Structural & Ornamental Iron Workers, 10 Ralph Avenue, Lake Grove, NY 11755

William J. Smith, International Union of Operating Engineers, 1125 Seventeenth Street, NW., Washington, DC 20036

Ronald Stanevich, National Institute of Occupational Safety and Health, Division of Safety Research, 944 Chestnut Ridge Road, Morgantown, WV 26505

C. Rockwell Turner, L.P.R. Construction, 1171 Des Moiners Avenue, Loveland, CO 80537

Eric Waterman, National Erectors Association, Suite 202, 1501 Lee Highway, Arlington, VA 22209

### IV. Agenda for the Organizational Meeting of SENRAC

The meeting will be called to order. The Secretary of Labor, or his designee, will then swear in the members of the Committee and charge the Committee with its duties and goals. The Facilitator will assume the Chair and the procedural issues will be addressed by the Committee. These will include the adoption of the Ground Rules which are the procedural rules that the Committee will follow. The substantive matters must be considered in the development of a tentative schedule of committee meetings, site visits and workgroup meetings. The Committee will have to identify and discuss these matters to be resolved and determine the proper sequence of consideration as well as the location of the future meetings. OSHA will have provided proposed Ground Rules, issues, agendas (sequence of consideration), and meeting locations to committee members prior to this meeting.

**25850**

### V. Appendices

Included in this notice are three appendices. The text of the appendices are adopted from OSHA's notice of intent to establish a negotiated rulemaking committee (57 FR 61860), and are organized in the following manner: Appendix I—the elemental theory of negotiated rulemaking; Appendix II—the proposed negotiation procedures, or how the theory would be applied, in practice, to this particular Neg/Reg; and, Appendix III—the key issues that OSHA expects to be the subject for resolution in this negotiated rulemaking. Issue I is narrowed from the earlier notice to reflect the Agency's decision to limit the scope of subpart R to steel erection and not to include the erection of precast concrete or wood structures.

### VI. Public Participation

All interested parties are invited to attend this public meeting at the time and place indicated above. No advanced registration is required. Seating will be available to the public on a first-come, first-served basis. Individuals with disabilities wishing to attend should contact the Facilitator to obtain appropriate accommodations no later than June 7, 1994. The opening public meeting is expected to last a day and a half; and SENRAC will be in session for an additional day and a half.

In addition, members of the general public may request an opportunity to make oral presentations to the Committee. The Facilitator of the Committee has the authority to decide to what extent oral presentations by members of the public may be permitted at the meeting. Oral presentations will be limited to statements of fact and views, and shall not include any questioning of the committee members or other participants unless these questions have been specifically approved by the Facilitator.

Part 1912 of Title 29 of the Code of Federal Regulations will apply generally. The reporting requirements of § 1912.33 have been changed pursuant to § 1912.42 to help meet the special needs of this Committee. Specifically, § 1912.33 requires that verbatim transcripts be kept of all advisory committee meetings. Producing a coherent transcript requires a certain degree of formality. The Assistant Secretary therefore has determined pursuant to § 1912.42 that such formality might interfere with the free exchange of information and ideas during the negotiations, and that the OSH Act would be better served by simply requiring detailed minutes of the proceedings without a formal transcript.

Minutes of the meetings and materials prepared for the Committee will be available for public inspection at the OSHA Docket Office, N–2625, 200 Constitution Ave., NW., Washington, DC 20210; Telephone (202) 219–7894.

The Facilitator, Philip J. Harter, can be reached at Suite 404, 2301 M Street, NW., Washington, DC 20037; telephone (202) 887–1033, FAX (202) 833–1036.

Any written comments should be directed to Docket No. S–775, and sent in quadruplicate to the following address: OSHA Docket Office, U.S. Department of Labor, room N–2625, 200 Constitution Ave., NW., Washington, DC 20210; Telephone (202) 219–7894.

### VII. Authority

This document was prepared under the direction of Joseph A. Dear, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210, pursuant to section 3 of the Negotiated Rulemaking Act of 1990, 104 Stat. 4969, Title 5 U.S.C. 561 *et seq.;* and Section 7(b) of the Occupational Safety and Health Act of 1970, 84 Stat. 1597, Title 29 U.S.C. 656.

Signed at Washington, DC, this 12th day of May, 1994.

**Joseph A. Dear,**

*Assistant Secretary of Labor.*

### Appendix I.—The Concept of Negotiated Rulemaking

#### *A. General*

Using negotiated rulemaking to actually develop a proposed rule is fundamentally different than normal § 6(b) rulemaking. Negotiated rulemaking is a process by which a proposed rule is developed by a committee composed of representatives of all the interests that will be significantly affected by the rule. Decisions are made by consensus, which generally requires concurrence among all of the interests represented.

The process is started by the Agency's careful identification of all interests potentially affected by the rulemaking under consideration.

Following receipt of the comments, the Agency establishes an advisory committee representing these various interests to negotiate a consensus on the provisions of a proposed rule. Representation on the committee may be direct, that is, each member represents a specific interest, or may be indirect, through coalitions of parties formed to represent a specific sphere of interest. The Agency is a member of the committee representing the Federal government's own set of interests.

The negotiated rulemaking (neg/reg) advisory committee is chaired by a trained mediator who facilitates the negotiation process. The role of this mediator, also called a facilitator, is to apply proven consensus building techniques to the OSHA advisory committee setting. The many functions that he will perform are discussed below.

Once a neg/reg advisory committee reaches consensus on the provisions of a proposed rule, the Agency, consistent with its legal obligations, uses such consensus as the basis for its proposed rule, to be published in the **Federal Register**. This provides the required public notice and allows for a public comment period. Other participants and other interested parties retain their rights to comment, participate in an informal hearing (if requested) and judicial review. OSHA anticipates, however, that the pre-proposal consensus agreed upon by this Committee will effectively narrow the issues in the subsequent rulemaking to only those which truly remain in controversy.

*B. Agency Commitment*

In initiating this negotiated rulemaking process, OSHA is making a commitment on behalf of the Department of Labor that the agency and all other participants within the Department will provide adequate resources to ensure timely and successful completion of the process. This commitment includes making the process a priority activity for all representatives, components, officials, and personnel of the Department who need to be involved in the rulemaking, from the time of initiation until such time as a final rule is issued or the process expressly terminated. Once the process has been initiated, all representatives, components, officials, and personnel of the Department shall be expected to act in accordance with this commitment.

As provider of administrative support, OSHA will take steps to ensure that the negotiated rulemaking committee has the dedicated resources it requires to complete its work in a timely fashion. These include the provision or procurement of such support services as: properly equipped space adequate for public meetings and caucuses; logistical support as necessary; word processing, information dissemination, storage and other information handling services required by the committee; the services of a facilitator; and such additional statistical, economic, health, safety, legal, computing or other technical assistance as may be necessary.

OSHA, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the Committee as the basis for the rule proposed by the Agency for public notice and comment. The Agency believes that by clarifying and updating the existing standards, it can limit or reduce the number of deaths and injuries to employees engaged in structural erection who are exposed to a significant risk of injury and death because of the outdatedness and lack of clarity of certain current provisions in subpart R. The Agency, therefore, is committed to publishing a consensus proposal that is consistent with OSHA's legal mandates.

*C. Negotiating Consensus*

As discussed above, the negotiated rulemaking process is fundamentally

different from the usual development process for OSHA proposed rules. Negotiation allows all the parties to discuss possible approaches to various issues rather than only asking them to respond to details of an OSHA draft proposal. The negotiation process involves a mutual education of the parties by each other on the practical concerns about the impact of various approaches. Each committee member participates in resolving the interests and concerns of other members, rather than leaving it up to OSHA to bridge different points of view.

A key principle of negotiated rulemaking is that agreement is by consensus of all the interests. Thus, no one interest or group of interests is able to control or dominate the process. The NRA defines consensus as the unanimous concurrence among interests represented on a negotiated rulemaking committee, unless the committee itself unanimously agrees to use a different definition. In addition, using a trained mediator to facilitate this process will assist all potential parties, including OSHA, to identify their real interests in the rule and so be able to reevaluate previously stated positions on issues involved in this rulemaking effort.

**Appendix II.—Proposed Negotiation Procedures**

*A. Committee Formation*

This negotiated rulemaking Committee will be formed and operated in full compliance with the requirements of the Federal Advisory Committee Act (FACA) in a manner consistent with the requirements of the Negotiated Rulemaking Act of 1990 (NRA).

*B. Interests Involved*

The Agency intends to conduct negotiated rulemaking proceedings with particular attention to ensuring full and adequate representation of those interests that may be significantly affected by the proposed rule. Section 562 of the NRA defines the term "interest" as follows:

> (5) "interest" means, with respect to an issue or matter, multiple parties which have a similar point of view or which are likely to be affected in a similar manner.

Particular attention has been given by the Department to ensure that any unique interests which have been identified in this regard, and which it is determined will be significantly affected by the proposed rule, are fully represented on the Committee.

*C. Members*

The negotiating group should not exceed 25 members, and fewer are preferable. OSHA is aware that there are many more potential participants, than there are membership slots on the Committee. The Agency does not believe, nor does the NRA contemplate, that each potentially affected group must participate directly in the negotiations; nevertheless, each affected interest should be adequately represented. In order to have a successful negotiation, it is important for interested parties to identify and form coalitions that adequately represent significantly affected interests. These coalitions, in order to provide adequate representation, must agree to support, both financially and technically, a member to the Committee whom they will choose to represent their "interest."

It is very important to recognize that interested parties who are not selected to membership on the Committee can make valuable contributions to this negotiated rulemaking effort in any of several ways:

- The person could request to be placed on the Committee mailing list, making written comment, as appropriate;
- The person could attend the Committee meetings, which are open to the public, caucus with his or her interest's member on the Committee, or even address the Committee (usually allowed at the end of an issue's discussion or the end of the session, as time permits); and/or
- The person could assist in the work of a workgroup which might be established by the Committee.

Informal workgroups are usually established by an advisory committee to assist the Committee in "staffing" various technical matters e.g., researching or preparing summaries of the technical literature or comments on particular matters such as economic issues before the Committee so as to facilitate Committee deliberations. They might also assist in estimating costs and drafting regulatory text on issues associated with the analysis of the affordability and benefits addressed, and formulating drafts of the various provisions and their justifications previously developed by the committee. Given their staffing function, workgroups usually consist of participants who have expertise or particular interest in the technical matter(s) being studied. Because it recognizes the importance of this staffing work for the Committee, OSHA will provide appropriate technical expertise for such workgroups.

*D. Good Faith Negotiation*

Committee members must be willing to negotiate in good faith and have the authority to do so. The first step is to ensure that each member has good communications with his or her constituencies. An intra-interest network of communication should be established to bring information from the support organization to the member at the table, and to take information from the table back to the support organization. Second, each organization or coalition should, therefore, designate as its representative an official with credibility and authority to ensure that needed information is provided and decisions are made in a timely fashion. Negotiated rulemaking efforts can require a very significant contribution of time by the appointed members that must be sustained for up to a year. Other qualities that can be very helpful are negotiating experience and skills, and sufficient technical knowledge to participate in substantive negotiations.

Certain considerations are central to negotiating in good faith. One is the willingness to bring all issues to the table in an attempt to reach a consensus, instead of keeping key issues in reserve. The second is a willingness to keep the issues at the table and not take them to other forums. Finally, good faith includes a willingness to move away from the type of positions usually taken in a more traditional rulemaking process, and instead explore openly with other parties all ideas that may emerge from the discussions of the committee.

*E. Facilitator*

This individual or organization will not be involved with the substantive development of the standard. Rather, the facilitator's role generally includes:

(1) Chairing the meetings of the committee in an impartial manner;

(2) Impartially assisting the members of the committee in conducting discussions and negotiations;

(3) Performing the duties of the Designated Federal Official under the FACA; and

(4) Acting as disclosure officer for committee records under the Freedom of Information Act (FOIA).

*F. OSHA Representative*

The OSHA representative will be a full and active participant in the consensus building negotiations. The representative will meet regularly with various senior OSHA officials, briefing them on the negotiations and receiving their suggestions and advice, in order to effectively represent their views regarding the issues before the Committee. OSHA's representative will also ensure that the entire spectrum of governmental interests affected by revisions of subpart R, including the Office of Management and Budget and other Departmental offices, are kept informed of the negotiations and encouraged to make their concerns known in a timely fashion. OSHA's representative will also communicate with the ACCSH on a regular basis, informing it of the status and content of the negotiations.

In addition, the OSHA representative will present the negotiators with the accumulated record evidence gathered on an issue-by-issue basis for their consideration. (The Committee may also consult OSHA's representative with regard to the Agency's regulatory needs, appropriate boundaries of consideration, or technical information. Such information could include the areas of technological feasibility and economic concerns, including direct and indirect costs of compliance.) The OSHA representative, together with the Facilitator, will also be responsible for coordinating the administrative and committee support functions to be performed by OSHA's support team.

*G. Committee Notice*

OSHA is issuing this notice to announce the establishment of the Committee and its membership. The negotiation process will begin once the Committee membership roster is published in the **Federal Register**.

*H. Tentative Schedule*

The first meeting will focus largely on procedural matters, including the proposed Ground Rules. These will also include agreement on dates, times, and locations of future meetings, and identification and determination of how best to address principal issues for resolution.

To prevent delays that might postpone timely issuance of the proposal, after consulting the committee, OSHA intends to terminate the Committee's activities if it does not reach consensus on a proposed rule within 12 months of the first meeting. The process may end earlier if the Facilitator or the committee itself so recommends.

*I. Record of Meetings*

In accordance with FACA's requirements, the Facilitator will keep minutes and a record of all committee meetings. This record will be placed in the public docket No. S–775 for this rulemaking. Committee meetings will be announced in the **Federal Register** and will generally be open to the public.

*J. Agency Action*

As noted above, the Agency intends to use the Committee's consensus as the basis for the NPRM. OSHA expects to issue the proposed rule developed by the Committee, unless the consensus is inconsistent with OSHA's statutory authority or is not appropriately justified. In that event, the Agency will explain the reason for its decision.

*K. Committee Procedures*

Under the general guidance and direction of the Facilitator and subject to any applicable legal requirements, appropriate detailed procedures for committee meetings will be established. Committee members will be presented with proposed Ground Rules and agendas prior to the first meeting.

### Appendix III—Some Key Issues for Negotiation

OSHA expects the key issues to be addressed as part of these negotiations will include:

1. *Scope and application:* Should subpart R cover construction specifications and work practices just for single and multi-story buildings or should it apply to all steel structures such as bridges, tanks and towers?

2. *Construction specifications and work practices:* Which construction specifications and/or work practices provide adequate protection for employee safety for steel erection? Would it be appropriate to limit the use of one-bolt connections? What rule is necessary regarding column stability? Should tandem ("christmas tree") loading and hoisting of structural members on the same (crane) hook be restricted? If so, how? What requirements should be set for double connections?

3. *Written construction safety erection plan:*

Should OSHA require a written safety erection plan including construction specifications and safety provisions before the actual erection of the structures may start? What should be the required component parts of such a plan?

4. *Fall protection:* (a) To what extent are the fall protection requirements of proposed subpart M appropriate for steel erection work? Are there circumstances under which employees, who perform initial connections of structural components or other erection work, should be exempted from those requirements? What are those circumstances?

To what extent would provisions for training and special designations adequately protect connectors or other erection workers from fall hazards?

(b) What costs are associated with providing fall protection to employees? To what extent do employers who provide fall protection reduce their costs, such as through lower insurance and workers compensation premiums? How would productivity, for example, measured in terms of the time required to erect a completed structure, differ according to the fall protection strategy chosen? Have injuries and fatalities been reduced through the implementation of fall protection technologies or procedures?

[FR Doc. 94–12089 Filed 5–17–94; 8:45 am]

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## 59 Fed. Reg. 26153 (May 19, 1994)

**DEPARTMENT OF LABOR**

**Occupational Safety and Health Administration**

**29 CFR Part 1926**

**[Docket No. S–775]**

**RIN No. 1218–AA65**

### Safety Standards for Steel Erection

**AGENCY:** Occupational Safety and Health Administration (OSHA), U.S. Department of Labor.

**ACTION:** Correction to Notice of Public Meeting; Appointment of Members to Advisory Committee; and Notice of Organizational Meeting of Advisory Committee.

**SUMMARY:** The Occupational Safety and Health Administration (OSHA) is correcting its announcement of the meeting of all parties interested in the Steel Erection Negotiated Rulemaking Advisory Committee (SENRAC), selection of the Advisory Committee and the organizational meeting of SENRAC from June 15–17, 1994, to June 14–16, 1994.

**DATES:** The meetings will be held on June 14, 15 and 16 1994. The informational meeting will begin at 10 a.m. on June 14, and the organizational meeting of the Committee will begin at 1 p.m. on June 15, 1994.

**ADDRESSES:** The meetings will be held in the Waterford Room on June 14 and 15 and the Haverford room on June 16 of the Hyatt Regency Hotel in Bethesda, Maryland; Telephone (301) 657–1234.

Any written comments in response to this notice should be sent, in quadruplicate, to the following address: Docket Office, Docket S–775, Room N–2625, 200 Constitution Ave., NW., Washington, DC 20210; Telephone (202) 219–7894.

**FOR FURTHER INFORMATION CONTACT:** Mr. James F. Foster, OSHA, U.S. Department of Labor, Office of Information and Consumer Affairs, Room N–3647, 200 Constitution Avenue, N.W., Washington, D.C. 20210; Telephone: (202) 219–8151.

**SUPPLEMENTARY INFORMATION:** This document contains corrections to the notice published Wednesday, May 18, 1994, announcing the meeting of all parties interested in the Steel Erection Negotiated Rulemaking Advisory Committee (SENRAC), selection of the Advisory Committee and the organizational meeting of SENRAC. The dates of the meetings are changed from June 15–17, 1994, to June 14–16, 1994.

The informational meeting will begin at 10 a.m. on June 14, and the organizational meeting of the Committee will begin at 1 p.m. on June 15, 1994.

The meetings will be held in the Waterford Room on June 14 and 15 and the Haverford Room on June 16 of the Hyatt Regency Hotel in Bethesda, Maryland.

This document was prepared under the direction of Joseph A. Dear, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, pursuant to section 3 of the Negotiated Rulemaking Act of 1990, 104 Stat. 4969, Title 5 U.S.C. 561 *et seq.;* and Section 7(b) of the Occupational Safety and Health Act of 1970, 84 Stat. 1597, Title 29 U.S.C. 656.

Signed at Washington, DC, this 17th day of May 1994.

**Joseph A. Dear,**

*Assistant Secretary of Labor.*

[FR Doc. 94–12444 Filed 5–18–94; 8:45 am]

BILLING CODE 4510–26–P

**The Institute
for
Environmental
Mediation**

3318 Queen Anne Ave. N.
Seattle, WA 98109
(206) 285-4641

Regional Office
1605 Monroe St.
Madison, WI 53711
(608) 257-1060

California Office
5301 Old Farm Rd.
Hidden Hills, CA 91302
(213) 999-1813

September 21, 1983

Dr. Leonard Vance
Director, Health Standards Programs
Occupational Safety and Health Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D. C. 20210

RE: Feasibility of Regulatory Negotiation for OSHA's Benzene Standard

Dear Dr. Vance:

We have discussed OSHA's standard governing the occupational exposure to benzene with representatives of the interests that would be substantially affected by it. Our purpose was to explore whether the parties believe it would be in their respective interest to use a process similar to that recommended by the Administrative Conference of the United States (Recommendation 82-4) to draft a standard and supporting documentation or at least substantially reduce the issues in contention.

## SUMMARY

We reached three major conclusions and a recommendation related to a further step that might be considered.

1. In the abstract, the development of a benzene standard appears to fit particularly well the criteria that have been suggested as critical in determining whether regulatory negotiation is likely to be successful and indeed a recommended approach.

2. The various interests have a range of options on a number of issues where solutions could potentially be found that meet the differing needs in a mutually acceptable fashion, including meeting OSHA's legal duties.

Dr. Leonard Vance
Page Two
September 21, 1983

3. Several factors, particularly the critical dimension of timing and a concern expressed by some as to the legitimacy of negotiations in the "classic" sense familiar in labor-management relations, militate against the appropriateness of the regulatory negotiation process as established in the ACUS Recommendation, at least until such time as there is greater assurance of its success.

4. We recommend that the affected interests set aside a couple of days in mid-October where they could meet jointly to discuss their particular needs and concerns. At that time, they could determine whether it is possible to design a consensus position or to substantially narrow areas of difference. We have drafted tentative ground rules for such a meeting should one be held.

## DISCUSSION

1. The Administrative Conference Criteria. The benzene standard appears in many ways to be an ideal candidate for regulatory negotiation:

- There are a limited number of relatively well defined parties.
- Individuals can be selected who will adequately represent the respective interests.
- The issues are well defined and ripe for resolution.
- The information needed to resolve important issues appears relatively well developed.
- The parties have had the opportunity to assess their respective needs, concerns, and positions.
- OSHA'S commitment to complete work on a proposed rule in November and a final rule by next summer indicates that a decision on a standard is inevitable and provides a realistic deadline to complete any discussions that would be held.
- A benzene standard has many components, and the parties have varying interests and concerns in the various components.
- There appears to be genuine doubt as to many aspects of

the standards, and no party or interest is in a position to dictate the result; thus, there is the sort of "countervailing power" that is often best reconciled by direct discussions.

2. Areas of Possible Discussion. We began and operated on the assumption that little would be served by the affected interests coming together to search for common ground if they are so far apart that there would be only a small chance of concurrence. Our discussions led us to conclude that the parties have concerns and needs that are not necessarily in direct contention or opposition to those of another interest on a surprisingly broad range of issues related to the standard. Indeed, there may be areas where the interests can assist one another to devise procedures and approaches that are in their mutual self-interest. A variety of interests expressed the view that they had concerns that would be difficult to address in a traditional rulemaking proceeding but that could be considered in direct discussions.

Our discussions confirmed the speculation that preparing for what is expected to be an adversarial proceeding tends to encourage parties to focus on areas of contention and, because a form of adjudication -- even if in a rulemaking context -- is expected, to couch their positions in particularly polarizing terms. One person observed that they had not really understood how inter-related the various elements of the standard were and how positions on one factor could affect flexibility on another until considering whether and how joint discussions could be productive.

We were also impressed by the number of instances in which many of the interests have in the past participated directly in informal efforts to search out areas of mutual concern and find mutually acceptable approaches. Indeed, as one person observed, there may be reasonable issues to negotiate and the parties have the combined experience that could preclude the need for mediators. But, the necessity to preserve positions that arise from the contentious procedures means that the parties rarely meet to attempt to resolve the issues or determine areas of common approach in a rulemaking proceeding. Thus, it appears that the approach may well be successful but one would need to create the specific opportunity for it.

3. The Limitations on the Approach. Despite the above, we have reluctantly concluded that we must recommend against proceeding with an effort to negotiate a benzene standard, at least at this time. Several factors have led to this conclusion.

Dr. Leonard Vance
Page Four
September 21, 1983

Foremost is the matter of time. OSHA is committed to completing its work on a proposed standard in November. It appears impossible to establish an advisory committee, have it settle into a working relationship, and develop a recommended proposed rule and supporting documentation without materially affecting the ability of OSHA to meet its commitment. Those with whom we spoke were unanimous in their opposition to any effort that could result in OSHA's projected timetable being delayed.

The matter of time is further complicated by the parties' skepticism about whether such a process, even if attempted, could be successful. We view this as entirely natural and healthy, especially considering the customary way standards are developed and the novelty of the proposed approach. In conjunction with the time constraints under which all are operating, it would be unreasonable to expect any of the interests to commit the type of resources necessary to a full scale negotiation while a rule is being developed internally on a parallel track. Finally, questions about the mechanics of how such a process would proceed lead to concerns over whether a party would unduly compromise its position in the event discussions broke down. That doubt also raises questions by some over the legitimacy of the process.

We believe these concerns could be addressed with sufficient time -- probably only several months -- but we cannot under the circumstances recommend that OSHA go forward with the effort or that the interests participate in it unless there is greater assurance than currently exists that it would be successful and result in a better rule than would the traditional approach.

4. Recommendations. We have three recommendations based on these findings and observations:

First, we recommend that OSHA not proceed at this time to use the regulatory negotiation procedure for the development of its benzene standard.

Second, we recommend that, given our conclusions from our extensive conversations with the interests most affected, the parties consider holding a meeting where they can meet to discuss the elements of what would comprise a mutually acceptable benzene standard and to determine the extent to which there is in fact the potential for developing a common approach or at least substantially narrowing the issues in contention. In the event the meeting is held and is successful, the parties can then decide on a future course of action.

Dr. Leonard Vance
Page Five
September 21, 1983

Third, we further recommend that if such an effort is to succeed the parties will need to agree beforehand on the ground rules and an agenda for the meeting. We have given considerable thought to such ground rules, based on our experience in complex multi-party disputes and on our discussions with those interested in the benzene standard in particular. We are prepared to assist the interests in developing them.

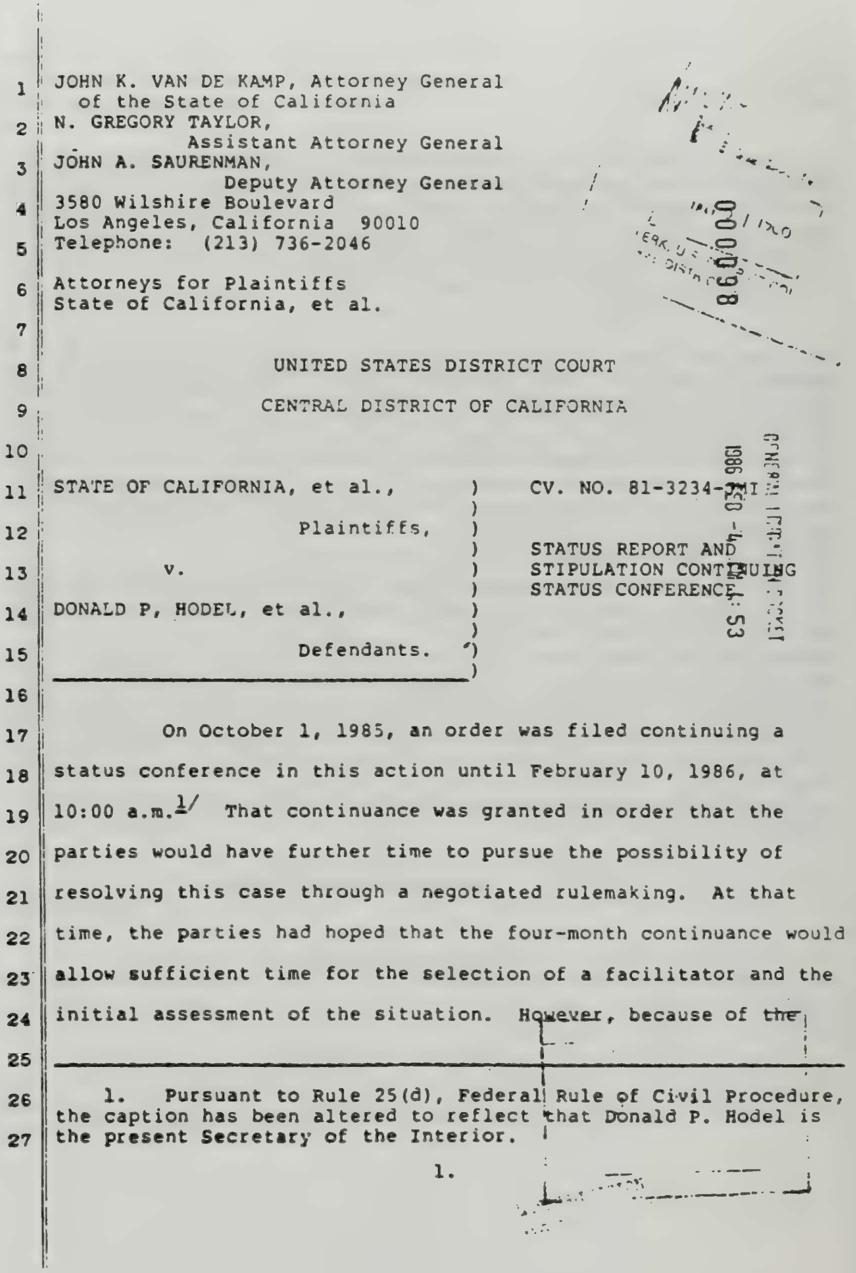
We have been most appreciative of the willingness of the various interests and their representatives to discuss with us the concept and implications of regulatory negotiation, both in a general sense and with particular reference to the benzene standard. We have come away with new insights into some of the factors that must receive further attention if the concept is to have broad application. We hope the parties have received some benefit from considering the development of standards and the differences that arise between the interests affected from a somewhat different perspective.

Our discussions reinforced our view that the interests most affected by a standard are much more knowledgeable as to its specific effects and implications -- and to possible options for attaining the same goals -- than OSHA, or any agency, can ever be. (That is certainly without any disrespect for OSHA, but rather reflects a simple observation on the practical realities of regulation generally.) We believe such an effort could lead to not only a better standard but one that can be implemented in a more timely and effective manner. The conclusion of a discussion meeting, if held, may be that the benefits of the process are still able to be achieved for the benzene standard notwithstanding its difficulties.

Respectfully submitted,

Gerald W. Cormick

Philip J. Harter



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0000988

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, et al.,
Plaintiffs,
v.
DONALD P, HODEL, et al.,
Defendants.

CV. NO. 81-3234-[illegible]MI

STATUS REPORT AND
STIPULATION CONTINUING
STATUS CONFERENCE

1986 FEB -4 PM 4:53

On October 1, 1985, an order was filed continuing a status conference in this action until February 10, 1986, at 10:00 a.m.[1] That continuance was granted in order that the parties would have further time to pursue the possibility of resolving this case through a negotiated rulemaking. At that time, the parties had hoped that the four-month continuance would allow sufficient time for the selection of a facilitator and the initial assessment of the situation. However, because of the need to accommodate this relatively new approach to conflict resolution with applicable federal procurement requirements, and because of the additional time needed to assure that all parties to the litigation agreed on the material aspects of selecting a facilitator and on the procedures to be followed after his or her selection, the process has not moved as expeditiously as expected.

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[1] Pursuant to Rule 25(d), Federal Rule of Civil Procedure, the caption has been altered to reflect that Donald P. Hodel is the present Secretary of the Interior.

The parties have met both in person and by conference telephone call to discuss the procedures for the negotiated rulemaking, and they have agreed upon a "Summary Plan for Negotiating the Rulemaking on California Offshore Air Quality" (hereafter the "Summary Plan"). A copy of the Summary Plan is attached hereto. The Summary Plan identifies the steps involved in the negotiated rulemaking, and the approximate amount of time required for each step. The parties have agreed now to implement Phase I as set out in the Summary Plan.

The Department of the Interior, with the involvement of the other paries to the litigation, is now in the process of procuring the services of a facilitator. The Department has developed, and has consulted with the other parties on, a comprehensive Statement of Work which sets forth the responsibilities of the facilitator, criteria for his or her selection, the process by which the different phases of the negotiated rulemaking will be conducted, and the roles the parties to the litigation will play throughout the entire process. (A copy of the Statement of Work is attached.) It presently is anticipated that the contract will be awarded by April 15, 1986. Following award of the contract, the facilitator will begin a two-month conflict assessment during which he or she will work with each of the parties to the litigation to determine whether from the facilitator's perspective this dispute is suitable for resolution through this process. The facilitator then will submit a report to the Department of the Interior and the other parties to the litigation which will include a professional statement of opinion on the prospect for resolving the issues through negotiation. There will then be a three-week period during which a decision will be made on continuing to the actual negotiation phase of the process.

The parties hereto believe that the appropriate point for a further report to the Court is shortly after the conflict assessment has been completed and a decision made on pursing the process.

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Therefore, the parties hereto, through their counsel of record, stipulate and agree to request a continuance of the status conference to August 4, 1986, at 10:00 a.m.

DATED: January 31, 1986.

JOHN K. VAN DE KAMP, Attorney General
of the State of California
N. GREGORY TAYLOR,
Assistant Attorney General
JOHN A. SAURENMAN,
Deputy Attorney General

By JA Saurenman
JOHN A. SAURENMAN

Attorneys for Plaintiffs
State of California, et al.

DATED: January 31, 1986.

ALAN RAMO
DANIEL P. SELMI

By Daniel P. Selmi by JAS
DANIEL P. SELMI

Attorneys for Plaintiffs in Intervention
Citizens for a Better Environment, et al.

DATED: January 31, 1986.

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JAMES R. ARNOLD,
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Attorneys for Federal Defendants
James G. Watt, et al.

DATED: January 31, 1986.

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McCutchen, Black, Verleger & Shea

By Donna R. Black by
DONNA R. BLACK

Attorneys for Defendants in Intervention
Western Oil and Gas Association, et al.

ORDER

IT IS SO ORDERED.

DATED: 1/31, 1986.

/S/
UNITED STATED DISTRICT JUDGE

# CHAPTER 5 - ORIENTATION AND TRAINING OF PARTICIPANTS

Participants in negotiated rulemaking proceedings may or may not have had significant negotiation experience and training. Mediators for a number of regulatory negotiations have found a wide disparity in negotiation experience among the participants, particularly where the number of participants is as large as 15 to 25. For this reason, most of the regulatory negotiations have begun with a pre-negotiation training and orientation session for participants. These sessions provide a chance for the parties to get together in an informal, educational setting and to help "level the playing field" with regard to negotiation skills prior to the beginning of the committee's actual work.

Pre-negotiation training sessions can accomplish the following major objectives:

- To augment and update the negotiation skills of the participants.
- To allow the participants to become acquainted with each other in a neutral setting and to begin to build a constructive relationship among themselves.
- To demonstrate consensus building techniques with non-threatening examples in the form of demonstrations, exercises or simulations.
- To allow the mediator(s) to observe the dynamics of interactions among members of the group.
- To provide a common vocabulary and procedures for operating consensually.

Some agencies have been initially reluctant to provide a training session because of a concern that participants will feel their experience or skill is in question. However, when the sessions are offered, reg-neg participants choose to attend and report that the orientation is valuable or perhaps essential.

Generally, agencies have provided 4-6 hours of training on the day before the negotiations actually begin. Sessions have been run both by experienced federal agency staff and by professional trainers, depending on personnel and funds available for the negotiation. The mediator chosen for the negotiation may be able to conduct the training or recommend a trainer.

The American Arbitration Association, the Society for Professionals in Dispute Resolution, and the Administrative Conference can provide lists of trainers experienced in teaching negotiation skills. The Program on Negotiation at Harvard Law School publishes a catalogue of negotiation exercises called "Clearinghouse, Teaching Materials on Negotiation and Dispute Resolution," from which training materials can be ordered. Frequently, federal agency training offices can recommend trainers and may have access to contract mechanisms to hire them. (See chapter 11 for further information about contacting these organizations and chapter 8 for information about contracting for services.) In addition, agencies may want to train some of their own personnel in negotiating skills. Such courses are regularly offered by the Department of Justice's Legal Education Institute, the Office of Personnel Management, and various private sources.

## Content of Training Sessions

The appendix to this chapter contains, as examples, the agendas for three training sessions: one run by federal employees for the Department of Transportation proceeding on non-discrimination in air travel; one by consultant ERM-McGlennon Associates for EPA's pesticide exemption negotiation; and one used by the Administrative Conference for the Federal Communications Commission.

The common elements of the sessions are short lectures on negotiation techniques and demonstrations or role-playing exercises. Most of the training sessions have been based on the "principled negotiation" methods described in Fisher and Ury, *Getting to Yes*. Lectures address topics such as "BATNA" (best alternative to negotiated agreement), interests versus positions, and maximizing joint gains ("win/win" rather than "win/lose"). Lectures are accompanied by handouts that define and illustrate terms and principles. In practice, the quantity of written training material has varied from basic introductory information to extensive texts.

Practice sessions allow the participants to test the effectiveness of various negotiation principles and techniques. Sessions have included several exercises, building from a simple two-party, one-issue exercise to a multi-party, multi-issue exercise. Participants break into small groups, each working on the same problem, putting into practice the lessons learned. At the conclusion, a debriefing session is held, during which participants and trainers discuss how the different groups have handled the exercise. The range of solutions emerging from the groups helps demonstrate to the participants that there is no one way to negotiate and no one solution to an issue. The trainers can also help participants explore why some negotiation techniques or tactics were more or less effective than others. The group exercises have the additional benefit of beginning to build constructive relationships and mutual respect among the participants.

The Administrative Conference has recommended that agencies conducting negotiated rulemaking consider providing the parties with limited, short-term training as outlined here. EPA has reported that these pre-negotiation sessions have made a real difference in the operation and success of negotiations. EPA staff indicate that they have consistently seen participants during the course of actual negotiations use the language presented and the distinctions drawn in the training sessions. For example, a participant can learn that it is possible to couch a proposal in terms of "what if I agreed to X?" as a way of inventing possibilities for exploration, without at the same time committing himself to that course.

A one-day training session will not change an inexperienced person into an expert negotiator, but it may provide methods and tools that will prove beneficial both to the participant and to the group as a whole.

## Appendix

The appendix contains three sample outlines for a one-day training session prior to commencing regulatory negotiations.

## PRE-NEGOTIATION ORIENTATION/TRAINING AGENDA (DOT)

| | |
|---|---|
| 9:30 a.m. | WELCOME AND INTRODUCTIONS |
| 9:45 | PURPOSE OF DAY |
| 10:00 | KEY NEGOTIATION TERMS AND CONCEPTS |
| 10:15 | TWO PARTY EXERCISE |
| 10:45 | DEBRIEF TWO PARTY EXERCISE |
| 11:00 | SECOND EXERCISE |
| 11:15 | DEBRIEF SECOND EXERCISE |
| 11:30 | THREE-PARTY EXERCISE |
| 12:10 | DEBRIEF THREE-PARTY EXERCISE |
| 12:30 | LUNCH -- FIVE PARTY EXERCISE ROLES ASSIGNED |
| 1:30 | BEGIN FIVE PARTY EXERCISE |
| 2:30 | DEBRIEF FIVE PARTY EXERCISE |
| 3:00 | SUMMARIZE LEARNINGS/CONCEPTS |
| 3:30 | TIE LEARNINGS TO NEGOTIATIONS |
| 4:00 | CRITIQUE ORIENTATION/TRAINING |
| 4:10 | ADJOURN/INFORMAL GET-TOGETHER |

PURPOSE OF DAY:

- TO INCREASE LIKELIHOOD OF SUCCESS IN THIS NEGOTIATION (SUCCESS HERE DEFINED AS BEST POSSIBLE CONSENSUS AGREEMENT ON SOME OR ALL ELEMENTS OF A RULE.)
- TO BUILD ON YOUR EXISTING EXPERIENCE AS NEGOTIATORS AND PROBLEM-SOLVERS (IF YOU WEREN'T ALREADY PRETTY GOOD, YOUR ORGANIZATION PROBABLY WOULDN'T HAVE SENT YOU.)
- TO IMPROVE YOUR UNDERSTANDING OF THE DYNAMICS OF A DISPUTE AND ITS MOST CONSTRUCTIVE RESOLUTION
- TO HELP YOU DEVELOP COMMON UNDERSTANDINGS OF KEY CONCEPTS, TERMS, AND ROLES
- TO HELP YOU HONE YOUR PRACTICAL PROBLEM SOLVING AND NEGOTIATING SKILLS
- TO HELP YOU GET A SENSE OF WHAT YOUR NEGOTIATIONS WILL BE LIKE SO YOU CAN HIT THE GROUND TOMORROW RUNNING
- TO HELP YOU TIE TODAYS LEARNINGS TO YOUR UPCOMING NEGOTIATION
- TO HELP YOU GET TO KNOW AND TO GET COMFORTABLE WITH ONE ANOTHER BY BEING TOGETHER IN AN INFORMAL SETTING

## KEY NEGOTIATION TERMS AND CONCEPTS:

### TERMS:

O REPRESENTATIVE: SOMEONE WITH THE ABILITY TO REPRESENT HIS/HER GROUP. SOMEONE WHO MIRRORS THE GROUP'S GOALS AND NEEDS. IS ABLE TO ACT IN THE GROUP'S STEAD IN REACHING AND RATIFYING AN AGREEMENT. MUST BE ABLE TO SPEAK FOR CONSTITUENCY.

O FACILITATOR: THIRD-PARTY NEUTRAL(S) WHO HELP TO KEEP THE PARTIES TALKING, LISTENING, OPERATING CONSENSUALLY, AND MOVING TOWARDS "GOOD OUTCOMES".

O MAXIMIZING JOINT GAINS: SOME OF THE THINGS WHICH ARE VERY IMPORTANT TO YOU ARE LESS IMPORTANT TO OTHERS, YOU CAN TRADE ACROSS ISSUES.

O PRINCIPLED NEGOTIATIONS: WHERE YOU NEGOTIATE ON THE MERITS OF MAXIMIZING JOINT GAINS AND ATTEMPT TO BE MUTUAL AND INVENTIVE PROBLEM-SOLVERS.

O INTERESTS vs. POSITIONS. AN INTEREST IS A BASIC UNDERLYING CONCERN WHICH WE SEEK TO ADDRESS. A POSITION IS A PARTICULAR STRATEGY TO ACHIEVE THE INTEREST.

O BATNA -- YOUR BEST ALTERNATIVE TO NEGOTIATED AGREEMENT

O A GOOD OUTCOME:

-- MUST BE PERCEIVED AS FAIR

-- MUST PROCEED FROM A PROCESS VIEWED AS EFFICIENT

-- MUST INCLUDE STABILITY, BE SOMETHING THAT YOU AND YOUR CONSTITUENCIES CAN LIVE WITH AND WILL IMPLEMENT

-- MUST INCLUDE WISDOM, MUST BE SOUND AND GROUNDED ON BEST TECHNICAL, ETC., INFORMATION AVAILABLE.

O PROCESS APPROACHES, E.G., BRAINSTORMING.

### CONCEPTS:

O SEPARATE THE PEOPLE FROM THE PROBLEM

O FOCUS ON INTERESTS NOT POSITIONS

O INVENT OPTIONS FOR MUTUAL GAIN

O INSIST ON USING OBJECTIVE CRITERIA

# TRAINING SESSION
# ON
# NEGOTIATING TECHNIQUES

FOR THE

## PESTICIDE EXEMPTION NEGOTIATING COMMITTEE

Sponsored By

Environmental Protection Agency

September 27, 1984

Conducted By
ERM-McGlennon Associates

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## TABLE OF CONTENTS

Page

INTRODUCTION. . . . . . . . . . . . . . . . . . . . . . . . . . .1
- Workshop Goals. . . . . . . . . . . . . . . . . . . . . .2
- Acknowledgements. . . . . . . . . . . . . . . . . . . . .2
- Course Outline. . . . . . . . . . . . . . . . . . . . . .3

SECTION I: UNDERSTANDING NEGOTIATIONS . . . . . . . . . . . 4
- Interests and Issues . . . . . . . . . . . . . . . . 5
  Tenant/Landlord - Exercise. . . . . . . . . . . 9
- Dynamics of Negotiations . . . . . . . . . . . . . 10
  Horizontal Bargaining . . . . . . . . . . . . . 11
  Vertical Bargaining . . . . . . . . . . . . . . 11
  Self-Vested Unilateral. . . . . . . . . . . . . 12
  Conciliatory Unilateral . . . . . . . . . . . . 12
  Internal Factors and Pressure from the Extended Table. . . . . . . . . . . . . . . . . 13
  Collective Participation. . . . . . . . . . . 13

SECTION II: CONDUCTING NEGOTIATIONS . . . . . . . . . . . . 14
- Position Development . . . . . . . . . . . . . . . 15
- Presenting Positions . . . . . . . . . . . . . . . 18
- Increasing Receptivity . . . . . . . . . . . . . . 30
- Caucusing. . . . . . . . . . . . . . . . . . . . . . 39
- Generating Alternatives. . . . . . . . . . . . . . 42
- Closure. . . . . . . . . . . . . . . . . . . . . . . 46
- Dispute Aftermath. . . . . . . . . . . . . . . . . 50
- Implementation . . . . . . . . . . . . . . . . . . 54

APPENDICES

- Do's and Don'ts of Negotiation . . . . . . . . . 58
- Bibliography . . . . . . . . . . . . . . . . . . . . 60
- ERM-McGlennon Associates . . . . . . . . . . . . 73
- Trainer Profiles . . . . . . . . . . . . . . . . . 73
- Glossary . . . . . . . . . . . . . . . . . . . . . 75
- List of Principals. . . . . . . . . . . . . . . . .77

# INTRODUCTION

In February 1983, EPA announced the beginning of its Negotiated Rulemaking Project. The Project is intended to explore the usefulness of face-to-face negotiations as a supplement to the current rulemaking process. The Project will test whether negotiation at an early stage of rulemaking can produce rules more quickly, less expensively and with less likelihood of litigation.

After many months of examining candidate rules for the Project, EPA selected the Nonconformance Penalty (NCP) rule under Section 206G of the Clean Air Act as the first rule. As the second rule, EPA has selected a Pesticide Exemption rule under Section 18 of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). A Pesticide Negotiating Committee has now been formed consisting of representatives of parties interested in or affected by the outcome of the proposed rule.

The purpose of this training session is to provide the members of the Pesticide Exemption Negotiating Committee with an opportunity to learn more about the techniques of negotiations. In particular, the session will focus on developing practical negotiating skills. While it is impossible to teach the wide range of negotiating skills in a one day session, the agenda presents key issues which should assist participants as they enter this first negotiation process.

This workbook describes the key fundamentals of negotiations and is intended for use during the training session and as a reference guide throughout the negotiations. The text has been prepared for EPA by ERM-McGlennon Associates. The workbook provides you with an unusual opportunity to create your own personalized resource guide on negotiations. We have developed a text with lesson outlines which will enable you, in certain sections, to make your own notes on the information presented by the trainers. This approach will help you to personalize and reinforce the basic information presented at the training session.

The workbook is organized into three sections:

SECTION 1: UNDERSTANDING NEGOTIATIONS

Discusses dynamics of negotiations and individuals behavior during conflicts.

SECTION II: GENERIC STEPS IN THE NEGOTIATION PROCESS

Eight steps of negotiations are presented. The practical techniques used to prepare for negotiations, conduct negotiations and reach a settlement are emphasized.

APPENDICES

Includes a listing of the Do's and Don'ts of negotiations as well as a complete bibliography of negotiating and mediating references. It describes ERM-McGlennon Associates and provides a profile of each of the trainers. A glossary of terms used in the text is also included.

## Workshop Goals

The goals of this workshop are as follows:

- to educate participants' in the fundamentals of environmental negotiations
- to improve participants' awareness of the dynamics of a dispute
- to develop participants practical negotiating skills including position development, bargaining strategies and negotiating style
- to demonstrate to participants ways to apply negotiating skills to the upcoming **Pesticide Exemption negotiation sessions.**

## Acknowledgements

Portions of this workbook have been drawn from environmental negotiation training material prepared for the Edison Electric Institute. We would also like to thank the Conservation Foundation, ACCORD, the National Center for Collaborative Planning and Community Service, and the American Arbitration Association for allowing us to incorporate sections of their work.

## COURSE OUTLINE

| STARTING TIMES AM/PM | TOPIC | PROCESS |
|---|---|---|
| Thursday, September 27, 1984 | | |
| 11:00 a.m. | Introduction | |
| | - Welcome | Chris Kirtz - EPA |
| | - 1 Up - 1 Down | Exercise/Lincoln |
| | - Introduce Trainers | |
| | - Workshop Goals | Discussion/McGlennon |
| | - Workbook and Agenda Review | |
| | - Self Introductions | |
| 11:30 a.m. | Understanding Negotiations | |
| | - Interests and Issues | Exercise/McGlennon |
| | - Dynamics of Negotiations | Lecture and Exercise/ Lincoln |
| | - Generic Steps in the Negotiation Process | Discussion/McGlennon |
| 12:30 p.m. | LUNCH | |
| 1:15 p.m. | Position Development | Lecture and Exercise/ Lincoln |
| 2:00 p.m. | Presenting Positions | Lecture/Lincoln |
| 2:45 p.m. | Increasing Receptivity | Lecture/McGlennon |
| 3:00 p.m. | Caucusing | Lecture/Lincoln |
| 3:30 p.m. | Generating Alternatives | Exercise and Discussion/McGlennon |
| 4:00 p.m. | Closure, Dispute Aftermath, Implementation | Lecture/Lincoln |
| 5:00 p.m. | Evaluation and Wrap-Up | Discussion/McGlennon |
| 5:00 - 6:00 p.m. | Cheese and Wine Reception | All |

## FEDERAL COMMUNICATIONS COMMISSION REG-NEG TRAINING
presented by the
## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### PRE-NEGOTIATION ORIENTATION AGENDA
April 10, 1995

| | |
|---|---|
| 9:30-9:45 | WELCOME |
| 9:45-10:15 | PARTICIPANT INTRODUCTIONS & MEASURES OF SUCCESS |
| 10:15-10:45 | THE REGULATORY NEGOTIATION (REG NEG) PROCESS |
| 10:45-11:00 | FCC EXPECTATIONS |
| 11:00-11:15 | BREAK |
| 11:15-12:00 | FCC PROTOCOLS |
| 12:00-12:45 | SUGGESTED ROLES & WAYS TO WORK TOGETHER;<br>KEY NEGOTIATING TERMS AND CONCEPTS |
| 12:45-2:00 | LUNCH |
| 2:00-3:15 | NEGOTIATION EXERCISE, DEBRIEF, ROLLING BREAK |
| 3:15-3:55 | PARTIES' EXPECTATIONS & 'INTERESTS'... A DISCUSSION |
| 3:55-4:05 | NEXT STEPS/REMAINING QUESTIONS |
| 4:05-4:10 | MEASURES OF SUCCESS REVISITED |
| 4:10-4:15 | THANKS -- MEETING FEEDBACK/ADJOURN |

# CHAPTER 6 - NEGOTIATING THE RULE

In traditional rulemaking, much energy, time, and other resources are expended by the agency, the regulated community, and the public on unilateral activities directed toward achieving divergent goals. Negotiated rulemaking restructures the process so as to channel the energy and resources toward cooperative problem-solving, so that the result will be a better, more acceptable rule. An investment in planning and carrying out the negotiation phase of reg-neg can well be outweighed by the long-term benefits of reduced costs of compliance, easier enforcement, greater satisfaction, and less litigation.

The negotiation phase is the central feature of the reg-neg process. While it is conceived as the major opportunity for public input in the proceeding, it is not just a substitute for public hearings or a public comment period, where each interested party submits its views and waits to see what will happen. Instead, it is a period of dynamic activity requiring careful planning and a reasonable period of time for parties, including the agency, to become acquainted with the process, the substantive issues, and the viewpoints of the other parties. These steps must occur before any real progress can be made in crafting solutions to the problems. Adequate time is also needed during the negotiations for participants to advise -- and be advised by -- their constituencies about the issues and the negotiations. Before a final commitment is made, the participants must have an opportunity to assure themselves that they really are speaking for their constituencies.

How much time any of these steps should take in a particular reg-neg depends, of course, on the complexity of the issues and the nature of the interests involved. In general, however, it will be unrealistic to expect negotiations to be completed in a single meeting -- even if the meeting is several days in length.

The Reg-Neg Act assumes that a facilitator will be used and specifies a number of duties for that person, including chairing meetings and keeping records, as well as assisting the committee members in the negotiations. (5 U.S.C. §566) See chapters 4 and 8 for further discussion of selecting appropriate facilitators.

## Design of the Negotiations

In designing the negotiation phase of reg-neg, the agency and its convenor and facilitator need to consider two kinds of issues: some related to the substance of the rule and some that are strictly procedural issues. While many of the operating procedures of the negotiating committee should be resolved by the committee itself, the agency should take the lead in preparing and presenting proposals for committee operation, both to save time and to demonstrate leadership. Many of the issues would have to be faced in preparing for any significant negotiation, but some are unique to negotiated rulemaking. The agency's convenor and facilitator will have much to contribute in resolving many of these issues due to their previous contact with the parties and their professional dispute resolution skills and experience.

The following issues generally should be addressed by the agency in advance of the negotiations. Some of these questions may require consideration by the negotiating committee as well.

1. *Agency Coordination*: Who will negotiate on behalf of the agency? How will the agency's negotiator interact and coordinate with agency rulemaking and technical staff, consultants, managers, and top decisionmakers, so that the negotiator can act effectively without delaying the negotiations? What other programs or offices (within the agency or in other agencies) will be affected by or interested in the proceeding? How will the negotiator deal with other interested federal agencies (including the Office of Management and Budget), with interested congressional staff, and with news media?

2. *Issue Selection and Management*: What issues are negotiable? What constraints are imposed on each of these issues by statute and agency policy? What positions will the agency take initially? What is the range of solutions acceptable to the agency? What are the expected needs and positions of the other parties at the table? Do the issues lend themselves to consideration by subcommittees? Will the negotiating committee need access to contract resources for research and investigation? If so, how will these resources be made available and be managed? How will the issues be communicated to the parties?

3. *Desired Outcomes*: What is the agency's desired outcome: a draft rule or a set of resolved issues for agency use in drafting the rule? Will the agency offer as a starting point for negotiations its own draft rule or a set of issues formulated by the agency? (An

initial draft can speed up or hinder the progress of negotiations, depending on whether the parties feel that their input is really desired.)

4. *Consensus*: What is the agency's definition of consensus? What does the agency plan to do if consensus is not reached on all issues?

5. *Timing*: What is the deadline for reaching agreement? What is the source of the deadline? How flexible is the deadline? What happens if the deadline is not met?

6. *Logistical Arrangements*: Where should meetings be held? How much space is needed and for how much time? Will additional rooms be needed for subgroup meetings? What supplies are needed (audio/visual equipment, paper, pens, easels and large pads for display of agendas and proposals, name tags, name plates, etc.) and who is responsible for providing them (agency, contractor, facilitator)? Should snacks and lunches be served during meetings to reduce the time spent reassembling the committee? Should the agency or the participants pay for snacks and lunches?

7. *Committee resources*: What resources will the agency make available for the committee, such as computers for word processing or handling data, secretarial services, copying services, conference rooms, or funds for travel or expert consultants?

8. *Notices*: If the committee is chartered under the Federal Advisory Committee Act (FACA), what notices of meetings must be placed in the Federal Register? (See chapters 3 and 4 and their appendices.) In the unusual instance that the committee is not covered by FACA, what notices are appropriate and where should they be published? Who is responsible for writing the notices and when must they be published?

The following questions normally are best resolved by the negotiating committee, although the agency should consider its own position on them in advance. Most of these issues should be addressed in the committee's “organizational protocols.” This term refers to the committee's own internal rules for organization and operation. The Reg-Neg Act provides that the committee may adopt such procedures, and this is ordinarily done at the first meeting. (5 U.S.C. §566(e)) Committee procedures are not subject to any requirement of public notice and opportunity for comment. (See the appendix for sample organizational protocols.)

1. *Scheduling of Meetings*: How many will be needed to address the issues? How should meetings of the full committee and of subcommittees be coordinated? How often should meetings occur? Where should meetings be held -- in Washington, D.C., or another city, or in a variety of locations, and on whose premises? Can a schedule be set in advance to reduce the administrative burden of fitting into dozens of people's calendars and finding available conference facilities?

2. *Advisers and observers*: Because each committee member represents some constituency, each can be expected to have one or more advisers. When should these advisers be allowed to speak at meetings? Since committee meetings will be open to the public, how will questions or statements from observers be handled? How will the committee handle written public comments received during the negotiations? Should there be any special provisions for dealing with the press?

3. *Agendas*: Will the agency or the facilitator propose agendas? What is the procedure for the committee to change the proposed agenda?

4. *Recording and communication*: Who will write minutes and how detailed do they have to be? (The Reg-Neg Act, §566(d), assigns to the facilitator the responsibility of managing the keeping of minutes and other records required by §10(b) and (c) of FACA. Minutes can be summaries rather than complete transcripts.) How and when will minutes be distributed? Who will handle communications between agency and committee members, and among the committee members -- the agency staff or the facilitator or some combination of the two? What restrictions will be set on future use of records, documents exchanged by negotiators, and statements? (Documents generated by the committee are public documents, but the parties probably will want to agree, for example, that written or oral statements made during the negotiations will not be used by other parties in any later litigation. See, for example, paragraph IV.A in the organizational protocols for the woodburning stoves reg-neg and paragraph 7.a in the protocols for the oil spill vessel response plans reg-neg, reprinted in the appendix. The Reg-Neg Act, §566(d), provides that personal notes and materials of the facilitator or committee members are not subject to the Freedom of Information Act.)

5. *Caucuses and subcommittee meetings*: Are subcommittees or working groups needed to focus on specific issues? How often will they meet? How will caucuses be called? Will a facilitator be

available for caucuses and subcommittee meetings? How will reports from these meetings be made to the full committee?

6. *Use of available resources*: How will the committee use and manage any available resources including funds for travel or consultants?

7. *Consensus*: What is the committee's definition of consensus? Will formal votes be taken, or will agreement be determined informally? Will the committee members be required to sign an agreement to signify consensus on the end product of the negotiations? Is the committee aiming for agreement on specific regulatory language or agreement on general principles?

There is no one right way to handle any of the above questions. Much depends on the rule under negotiation, the participants in the negotiation, and the time frame available for the negotiation. The agency should make every effort to address these issues prior to the beginning of the negotiations and to prepare some suggested procedures and schedules for consideration of the committee at the first meeting. EPA, for example, prepares draft organizational protocols for presentation at the committee's organizational meeting. Sample protocols are reprinted in the appendix.

## Organizational Meeting

Organizational details should be decided by the committee at its first meeting. Often, if the rule is complex and the negotiations are expected to take several months, it may take most of a day for the parties to consider organizational issues, both substantive and procedural, and to reach consensus on what the committee's goals are, how the substance of the subject matter will shape the structure of subcommittees and schedules, and how the committee is to operate. If the first meeting of the committee is purely organizational, and no decisions are to be made about advising the agency, then it appears not to be necessary for the advisory committee charter to be approved in advance.

For this first meeting, the agency should propose an agenda that includes introduction of the participants and identification of the interests they represent, a briefing on the concept of regulatory negotiations, a discussion of the issues involved in the rule under negotiation, and proposals for operation of the committee. The committee's first exercises in reaching consensus should be to decide on the issues to be negotiated and to agree on written procedures for committee operation and use of resources. When the organizational issues are resolved, it is helpful for the facilitator to emphasize the positive idea that the committee has already reached consensus on a number of issues. If the Federal Register notice of intent resulted in additional parties requesting representation or additional issues to be negotiated, these topics may also be addressed at the organizational meeting.

## Consensus

The definition of the term "consensus" is key to the success of the negotiations. Before deciding to participate in negotiated rulemaking, each party will have come to some preliminary understanding of what "consensus" means. (The implications of reaching consensus are also discussed in chapter 4 in the context of the convenor educating potential participants about the negotiated rulemaking process. See "Steps in the Convening Process.") The notion of consensus should be discussed at the committee's first meeting so that there will be a shared understanding of the goal of the committee.

The Reg-Neg Act defines “consensus” as follows:

> unanimous concurrence among the interests represented on a negotiated rulemaking committee . . ., unless such committee--
>
> (A) agrees to define such term to mean a general but not unanimous concurrence; or
>
> (B) agrees upon another specified definition. (5 U.S.C. §562(2))

Generally, in a practical sense, consensus has meant that no interest represented on the committee opposes the decision on the item under consideration. Achieving consensus does not necessarily require a formal yes or no vote, nor is it necessary that each interest represented affirmatively *like* the decision, merely that it does not or will not oppose the decision if implemented. Some committees have carried out their negotiations without a formal vote ever being taken. A committee might decide, for example, that consensus will be reached if each participant refrains from challenging a proposal without having to take a positive step such as signing a formal agreement. Each committee should be offered the chance to define consensus in its own way and to decide on how consensus will be recognized by the facilitator and by the committee.

Parties that are willing to commit themselves formally to support an agreement in any subsequent litigation may nevertheless have a problem with a dissenting constituent. Throughout the negotiations, the participants should be aware that they may not be able to bind all of their constituents to an agreement. For example, a national organization's representative may speak authoritatively for the combined interests of the members of the organization, but an individual company or chapter may perceive effects on itself different from the effects on the aggregate interest. That single member may later challenge the rule, either by filing critical comments with the agency or by filing a lawsuit in court.

If such differences are known before an agreement is signed, and they cannot be settled through negotiations within the interest group, then the organization's representative should inform the other parties at the table. Under these circumstances, the representative of the interest group or national organization can still support a consensus agreement in good faith because of his view of the aggregate interest. If an individual company or chapter files suit after the final rule is promulgated, then the national organization would be expected to continue its support of the rule.

Because orderly procedure will require the committee to address issues sequentially, the parties must understand that during the negotiations no decision of the committee will be considered final until all issues have been discussed and a preliminary consensus has been reached on each. This recognizes the fact that each issue has a different importance to each party and that the nature of negotiation involves trading one's less important issues for concessions on more important issues.

## Structuring the Negotiating Sessions

Each committee's approach to negotiations will depend on the individual circumstances and the personalities who are involved. Nevertheless, there are some general structural options that have been useful in successful regulatory negotiation sessions.

In framing the issues to be negotiated, the committee will probably want to identify any underlying assumptions that participants may have. Sometimes it is helpful to cluster related issues, either as an aid to setting the agenda for the committee or for assignment to subcommittees for more focused attention.

Subcommittees or working groups may be formed in order to assemble data, or to examine issues and prepare proposals for consideration by the full committee. Subcommittees, of course, should have a balanced membership and should not be authorized to make final decisions. Parties with allied interests may want to caucus for the purpose of exploring joint negotiating positions, and such meetings should not be considered as subcommittee meetings. (See chapter 3 for a discussion of whether FACA requires meetings of less than the full committee to be open to the public.)

It is usually most convenient to schedule subcommittee meetings on the day before or the day after a meeting of the full committee, particularly if members come to the negotiations from different parts of the country. If subcommittees are scheduled to meet at the same time, it is important to ensure that any parties who want to participate in more than one of the concurrent meetings will have enough people available to do so. An interest may be represented on a subcommittee by its designated member of the full committee, by a formally designated alternate representative, or by any other person with appropriate expertise.

Some agencies have made technical consultants available to negotiating committees to assist them as needed during the negotiations. In other instances, the committee has retained an expert either to advise the entire group or to advise an individual interest.

### Meeting Management

The Reg-Neg Act provides that a facilitator will chair meetings of the committee and assist the members in conducting discussions and negotiations. (5 U.S.C. §566(d)) Beyond mediation skills, an experienced facilitator will know how to manage meetings efficiently in order to achieve consensus. These skills are particularly important because of the large numbers of parties and typically short deadlines for reaching agreement. Generally, a draft agenda should be sent to participants in advance. Discussion and adoption of the agenda should be the first order of business at each meeting. The facilitator is then responsible for keeping the meeting on schedule or calling for adjustments in the schedule if needed.

The facilitator is also responsible for keeping a list of items and issues in front of the committee so that each party can see the progress of the meeting. Often this is the job of a recorder who uses a blackboard, overhead projector, or large pads on easels to write down and display agendas or items under discussion, the issues and their resolution. A separate recorder may be taking minutes or tracking changes in draft document language.

A skilled mediator or facilitator will help the committee recognize when a break, caucus or subcommittee meeting is needed. Often an impasse can be overcome by using one of these techniques. A facilitator can also recognize when consensus has been reached, even though discussion of positions may be continuing, and can also recognize when an impasse occurs.

## Deadlines

The "axiom" that 90% of the progress in a negotiation occurs in the last 10% of the time allotted seems to apply to reg-neg. It is important for the negotiations to be driven by a deadline, whether statutory, judicial, or based on the agency's own regulatory agenda. If the deadline is imposed upon the agency, then the agency must be prepared to take steps to meet the deadline even if negotiations reach an impasse. Where the agency itself has created the deadline, the agency can decide to extend the deadline if the parties appear to be close to consensus or a breakthrough in the negotiations appears imminent. However, all parties, including the agency, should feel some pressure to reach a resolution.

## Coordination, Agency Review and Concurrence

Negotiated rulemaking takes place as a supplement to the normal rulemaking procedures of an agency. The reg-neg process generally will force a more compressed schedule of agency internal review of issues because the agency's negotiator will need to conform to the meeting schedule agreed to by the committee. That schedule cannot easily be altered because of the commitments of the outside parties. This need for compression should not result in skipping any of the necessary review and concurrence steps within the agency.

Agency management and other related program offices need to be kept up to date on the issues under consideration and the proposed solutions if the agency's negotiator is to act effectively.

Other parts of the government such as the Office of Management and Budget, other affected agencies, and interested congressional committee staff may need to be briefed frequently. The worst thing that can happen to a negotiator is to agree to an apparent committee consensus on an issue and then to have agency management or another federal entity disagree and force a change or reconsideration. This endangers the credibility of both the negotiator and the agency and hampers further consensus efforts of the committee. The best way to minimize the likelihood of such a development is to have adequate ongoing communication and coordination with other concerned government offices during the course of the negotiations. The negotiator will then be better prepared to determine when it is preferable to make on-the-spot decisions on the issues and when consultation with other officials is required before a decision can be made.

## Appendix

The appendix contains sample Federal Register notices for negotiating sessions. Also included, as examples, are the organizational protocols for EPA's negotiating committee on standards for woodburning stoves and the Coast Guard's committee on oil spill vessel response plans. The organizational protocols list basic operating procedures for the committee.

## 60 Fed. Reg. 15888 (Mar. 28, 1995)

**DEPARTMENT OF LABOR**

**Occupational Safety and Health Administration**

**29 CFR Part 1926**

### Steel Erection Negotiated Rulemaking Advisory Committee

**AGENCY:** Occupational Safety and Health Administration (OSHA), Labor.

**ACTION:** Notice of committee meeting.

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**SUMMARY:** Under the provisions of the Federal Advisory Committee Act (FACA), notice is hereby given of a meeting of the Steel Erection Negotiated Rulemaking Advisory Committee (SENRAC). Notice is also given of the location of the meeting. This meeting will be open to the public. Information on room numbers will be available in the lobby of the designated building. A schedule of additional meetings will be provided in a future notice.

**DATES:** The meeting is scheduled for April 17–19, 1995. The meeting will begin at 1:00 p.m. on April 17th.

**ADDRESSES:** Hyatt Hotel at Dulles Airport—2300 Dulles Corner Boulevard, Herndon, VA 22071; telephone (703) 713–1234.

**FOR FURTHER INFORMATION CONTACT:** Ann Cyr, Acting Director, Office of Information and Consumer Affairs, OSHA, U.S. Department of Labor, Room N–3647, 200 Constitution Avenue, N.W., Washington, D.C. 20210; telephone (202) 219–8151.

**SUPPLEMENTARY INFORMATION:** On May 11, 1994, OSHA announced that it had established the Steel Erection Negotiated Rulemaking Advisory Committee (SENRAC)(59 FR 24389) in accordance with the Federal Advisory Committee Act (FACA), the Negotiated Rulemaking Act of 1990 (NRA) and section 7(b) of the Occupational Safety and Health Act (OSH Act) to resolve issues associated with the development of issues are now occurring at the meetings.

All interested parties are invited to attend the Committee meetings at the time and place indicated above. No advanced registration is required. Seating will be available to the public on a first-come, first-served basis. Individuals with disabilities wishing to attend should contact the Facilitator to obtain appropriate accommodations.

During the meeting, members of the general public may informally request permission to address the Committee.

Minutes of the meetings and materials prepared for the Committee will be available for public inspection at the OSHA Docket Office, N–2625, 200 Constitution Ave., N.W., Washington, D.C. 20210; telephone (202) 219–7894. Copies of these materials may be obtained by sending a written request to the Facilitator.

The Facilitator, Philip J. Harter, can be reached at Suite 404, 2301 M Street, NW, Washington, D.C. 20037; telephone (202) 887–1033, FAX (202) 887–1036.

**Authority:** This document was prepared under the direction of Joseph A. Dear, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210, pursuant to section 3 of the Negotiated Rulemaking Act of 1990, 104 Stat. 4969, Title 5 U.S.C. 561 *et seq.;* and Section 7(b) of the Occupational Safety and Health Act of 1970, 84 Stat. 1597, Title 29 U.S.C. 656.

Signed at Washington, DC, this 22nd day of March 1995.

**Joseph A. Dear,**

*Assistant Secretary of Labor.*

[FR Doc. 95–7527 Filed 3–27–95; 8:45 am]

BILLING CODE 4510–26–P

## 51 Fed Reg. 18661 (May 21, 1986)

[FRL-3019-3]

### An Open Meeting of the New Source Performance Standards for Residential Wood Combustion Units Negotiated Rulemaking Advisory Committee

As required by section 9(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), EPA is giving notice of an open meeting of the Advisory Committee on New Source Performance Standards for Residential Wood Combustion Units.

The meeting is scheduled on June 11 and 12, 1986, and will be held at the National Institute for Dispute Resolution, 1901 L Street, NW., Suite 600, Washington, DC 20036. Each day the meeting will begin at 9:00 a.m. and will run until completion.

The purpose of the June meeting is to work on substantive issues, including: (1) Catalyst replacement (what policies should be applied), (2) selecting the best developed technology, and (3) deciding on the level of the standard (including whether there should be separate standards for catalytic and non-catalytic stoves). At this meeting, we anticipate the group will continue working on the draft language of the proposed rule, possibly revisiting some of the issues from prior meetings.

If interested in attending, or in receiving more information, please contact Kathy Tyson at (202) 382-5352.

Dated: May 14, 1986.

Milton Russell,

*Assistant Administrator for Policy, Planning and Evaluation.*

[FR Doc. 86-11518 Filed 5-20-86; 8:45 am]

BILLING CODE 6560-50-M

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## 51 Fed Reg. 23468 (June 27, 1986)

[OPPE-FRL-3040-5]

### New Source Performance Standards for Residential Wood Combustion Units, Negotiated Rulemaking Advisory Committee; Open Meeting

As required by section 9(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), EPA is giving notice of the last two open meetings of the Advisory Committee on New Source Performance Standards for Residential Wood Combustion Units.

The first two-day meeting is scheduled on Wednesday, July 16, and Thursday, July 17, 1986. The second two-day meeting is scheduled on Wednesday, August 20, and Thursday, August 21, 1986. All days, the meetings will be held at the national Institute for Dispute Resolution, 1901 L Street, NW., Suite 600, Washington, DC 20036. All days, the meetings will begin at 9:00 a.m. and will run until completion.

The purpose of the July meeting is to review a number of the issues discussed in prior meetings that were not resolved. Topics will include the selection of BDT, the selection of emission levels, and weighting bases. At this meeting, we anticipate the group will work toward a consensus on the concepts and language of the proposed rule.

The purpose of the August meeting is to reach consensus on concepts and language to be used for the Notice of Proposed Ruelmaking on New Source Performance Standards for Residential Wood Combustion Units.

If interested in attending, or in receiving more information, please contact Kathy Tyson at (202) 382-5352.

Dated: June 23, 1986.

Milton Russell,

*Assistant Administrator for Policy, Planning and Evaluation.*

[FR Doc. 86-14551 Filed 6-26-86; 8:45 am]

BILLING CODE 6560-50-M

March 20, 1986

ENVIRONMENTAL PROCTECTION AGENCY
NEGOTIATING COMMITTEE FOR
NSPS FOR RESIDENTIAL WOOD COMBUSTION UNITS

# ORGANIZATIONAL PROTOCOLS

## I. PARTICIPANTS

A. Interests Represented. Any interest that would be substantially affected by an EPA new source performance standard for residential wood combustion units may be represented on the negotiating committee. Parties may group together into caucuses to represent allied interests.

B. Additional Parties. After negotiations have begun, additional parties may join the Committee only with the concurrence of the Committee and if within the number of parties permitted under the Committee's charter.

C. Representatives. A senior representative of each party or their alternate must attend each full negotiating session. The designated representative may be accompanied by such other individuals as the representative believes is appropriate to represent his/her interest, but only the designated representative will have the privilege of sitting at the negotiating table and of speaking from the floor during the negotiations without Committee approval, except that any Committee member may call upon a technical adviser to elaborate on a relevant point.

D. Constituents' Interests. Participants are expected to represent the concerns and positions of the interests of their constituents and to ensure that any agreement developed by the Committee is acceptable to the organization from which the participant comes.

## II. DECISIONMAKING

A. Consensus. The Committee will operate by consensus. Committee decisions will be made only with the concurrence of all interests represented. The goal of the Committee is to reach a consensus that will take the form of a written statement that will be signed by all parties.

B. Workgroups. Smaller working groups may be formed to address specific issues and to make recommendations to the Committee. Working groups are not authorized to make decisions for the Committee as a whole. Their meetings will be held between the full sessions. Working group meetings will be scheduled in the same location and time whenever possible. All committee members will be notified of all working group meetings.

C. Agendas. Meeting agendas will also be developed by consensus. The Committee will determine if information requests are reasonable and relevant.

D. Impasse. If a deadlock or impasse is declared by any party, the facilitator will be available to help the deadlocked parties to try to resolve the impasse.

E. Caucus. A caucus can be declared by any participant at any time.

## III. EPA USE OF AGREEMENT

EPA is committed to using any consensus reached in these negotiations as the basis of a proposed rulemaking.

## IV. SAFEGUARDS FOR THE PARTIES

A. Good Faith. All participants must act in good faith in all aspects of these negotiations. Specific offers, positions, or statements made during the negotiations may not be used by other parties for any other purpose or as a basis for future litigation. Personal attacks and prejudiced statements will not be tolerated.

B. Right to Withdraw. Parties may withdraw from the negotiations at any time without prejudice.

C. Others' Positions. No party will hold discussions with the press characterizing the position of any other party if a party withdraws.

D. Information.

(1) All parties agree not to withhold relevant information. If a party believes it cannot or should not release such information, it will provide the substance of the information in some form (such as by aggregating data, by deleting non-relevant confidential information, by providing summaries, or by furnishing it to a neutral consultant to use or abstract) or a general description of it and the reason for not providing it directly.

(2) Parties will provide information called for by this paragraph as much in advance of the meetings as is reasonably convenient.

(3) All parties agree not to divulge information shared by others in confidence.

(4) Information and data provided to the Committee is a matter of public record.

## V. OPEN PROCESS

The negotiations will be conducted under the Federal Advisory Committee Act (FACA). Negotiating sessions will be announced in the Federal Register prior to the meeting and, consistent with FACA requirements, will be open to the public. The proceedings will not be electronically recorded, but draft minutes of Committee meetings will be kept and approved by the Committee. The minutes will be made available to the public on request.

## VI. SCHEDULE

A. Time and location. Negotiating sessions will initially be held once each month. The first negotiating session is scheduled for March 20. 1986. Unless otherwise agreed upon, a deadline of four months for the negotiations will be established. The location of the meetings will be decided by the group.

B. Discontinue if unproductive. The participants may discontinue negotiations at any time if they do not appear productive.

## VII. FACILITATOR

A neutral facilitator will work with all the parties to ensure that the process runs smoothly.

January 8, 1992

## UNITED STATES COAST GUARD
## NEGOTIATING COMMITTEE FOR
## TANK VESSEL RESPONSE PLANS AND THE CARRIAGE OF DISCHARGE-REMOVAL EQUIPMENT

## ORGANIZATIONAL PROTOCOLS

### 1. GOAL OF THE COMMITTEE

The goal of the Negotiating Committee is to reach consensus on recommended proposed and final regulations concerning tank vessel response plans and the carriage and inspection of discharge-removal equipment pursuant to the Oil Pollution Act of 1990.

### 2. PARTICIPANTS

a. **Interests Represented.** Any interest that would be significantly affected by Coast Guard regulations governing tank vessel response plans and the carriage of removal equipment may be represented in the negotiations.

b. **Interest Caucuses.** Organizations, agencies, companies, or individual may join with other allied interests to form a caucus. An interest caucus may authorize one or more individuals to represent the caucus.

c. **The Negotiating Committee.** Each organization or interest caucus that is represented in the negotiations shall appoint a designated number of members of the Negotiating Committee. Each organization or interest caucus that is represented on the Committee shall be deemed a party to the negotiations.

d. **Alternates for Committee Members.** Each party to the negotiations may designate an alternate committee member. Alternates may substitute for Committee Members in the event the Member cannot attend a session of the Negotiating Committee.

e. **Additional Parties.** Additional parties may join the Committee after negotiations have begun only with the concurrence of the Committee.

f. **Attendance at Meetings.**

(1) Each Committee Member agrees to make a good faith effort to attend every session of the Negotiating

Committee. The Committee Member's alternate agrees to make a good faith effort to attend any Committee meeting that the Member is unable to attend.

(2) The Committee Member may be accompanied by such other individuals as the Committee Member believes is appropriate to represent his/her interest.

(3) Only the Committee Member or the alternate will have the privilege of sitting at the negotiating table and of speaking from the floor during the negotiations without Committee approval, except-

(a) any Committee Member may call upon a technical adviser to elaborate on a relevant point, and

(b) pursuant to the Federal Advisory Committee Act, any person attending the Committee meetings may address the Committee if time permits or file statements with the Committee.

g. **Constituents' Interests.** Committee Members are expected to represent the concerns of their interest group to ensure that any agreement developed by the Committee is acceptable to the organization or caucus which the Committee Member represents.

## 3. DECISIONMAKING

a. **Consensus.** The Committee will operate by consensus. Committee decisions will be made with the concurrence of all parties to the negotiations.

b. **Workgroups.**

(1) Smaller workgroups may be formed to address specific issues and to make recommendations to the Committee. The membership of each workgroup shall consist of no more than fifteen people. Each party may designate members of each workgroup. Other individuals who the Committee believes would enhance the functioning of a workgroup or representatives of interests that would be significantly affected by the topics addressed by the workgroup but which are not otherwise represented on the Negotiating Committee may also serve on that workgroup. Not all organizations or interest caucuses represented on the Negotiating Committee need to participate in each workgroup. The decision as to whether or not to participate is the prerogative of that organization or caucus.

Organizational Protocols for Tank Vessel Response Plans

(2) Workgroups are not authorized to make decisions for the Committee as a whole. Decisions to forward a report of a workgroup to the Negotiating Committee shall be made with the concurrence of all workgroup members who are present at the meeting where the decision is made.

(3) Workgroup meetings will be held between the full sessions and will be scheduled in the same location and time whenever possible. All Committee Members will be notified of all workgroup meetings.

c. **Discontinue if Unproductive.** The Committee or the Coast Guard may discontinue negotiations at any time if they do not appear productive.

d. **Deadline for Negotiations.** Negotiations concerning a Notice of Proposed Rulemaking will terminate by March 15, 1992 unless the Committee decides to extend the deadline.

## 4. AGREEMENT

a. **Written Statement.** Any agreement reached by the Committee on recommended regulations will take the form of a written statement that will be signed by all parties to the negotiations.

b. **Statement as Basis for NPRM.** The Coast Guard agrees to use the written statement as the basis of a Notice of Proposed Rulemaking to the maximum extent possible consistent with the Agency's legal obligations. The Coast Guard will draft proposed regulations and preambles that have the same substance and effect as the written statement. If the Committee reaches an agreement on recommended proposed regulations after the Coast Guard has issued a Notice of Proposed Rulemaking, the Coast Guard will use that agreement as the basis of a notice to supplement the original proposal.

c. **Distribution of NPRM.** The Coast Guard will send the members of the Committee copies of the proposed regulations and their preamble prior to the signature of the Commandant. The Coast Guard will consult with Committee members with respect to the draft regulations and preambles in an effort to address any concerns they may have.

d. **No Negative Comments.** Each party agrees not to file negative comments on the proposed regulations or their preamble to the extent they have the same substance and effect as the written statement.

e. **Response to Public Comments.** The Coast Guard will consider all relevant comments submitted concerning the Notice of Proposed Rulemaking and will make such modifications in the proposed regulations and their preamble as are necessary when issuing final regulations. After close of the comment period on the Notice of Proposed Rulemaking, the committee will reconvene as necessary to consider those comments for preparation of the final rule.

f. **No Adverse Action and Support.** Each party other than the Coast Guard agrees not to take any action to inhibit the adoption of the recommended proposed regulations as final regulations to the extent the final regulations and their preamble have the same substance and effect as the written statement. If any person does anything to inhibit the adoption of final regulations that have the same substance and effect as the written statement, each party other than the Coast Guard agrees to submit comments to the Coast Guard and any other relevant Federal official stating that-

  (1) the party concurred in the written statement;

  (2) it supports the adoption of final regulations with the same substance and effect as the written statement; and

  (3) the position of the person seeking to inhibit the adoption of final regulations with the same substance and effect as the written statement should be rejected.

g. **Distribution of Draft Final Rule.** The Coast Guard will send the members of the Committee copies of the final regulations and their preamble prior to the signature of the Commandant. The Coast Guard will consult with Committee members with respect to the draft final regulations and preamble in an effort to address any concerns they may have to the maximum extent consistent with applicable law.

h. **Final Rule.** Recognizing that under the Appointments Clause of the Constitution governmental authority may be exercised only by officer of the United States and recognizing that it is the Coast Guard's sole responsibility to issue a final rule, the Coast Guard intends to issue final regulations that are based on the written agreement concurred in by the Committee as modified pursuant to Paragraph (e).

Organizational Protocols for Tank Vessel Response Plans

i. **No Challenge.** Each party other than the Coast Guard agrees not to challenge the regulations in court to the extent that the final regulations and their preamble have the same substance and effect as the written statement.

j. **Memo of Concurrence in Docket.** Each party other than the Coast Guard agrees to submit a memorandum to the docket that it participated in the negotiations and that it concurred in the recommended proposed regulations when considered as a whole if-

  (1) adverse comments are filed with the agency or the regulations are challenged in court and

  (2) the preambles and regulations have the same substance and effect as the written statement.

k. State Governments. Each State member of the Negotiating Committee agrees to support rules for adoption at the State that are consistent with the written statement and the final regulations and their preamble to the extent the final regulations and their preamble have the same substance and effect as the written statement.

## 5. FACILITATOR

A neutral facilitator will work with all the parties to ensure that the process runs smoothly. The facilitator serves at the will of the Committee.

## 6. MEETINGS

a. FACA and NRA. The negotiations will be conducted under the Federal Advisory Committee Act (FACA) and the Negotiated Rulemaking Act of 1991 (NRA).

b. Open Meetings. Negotiating sessions will be announced in the Federal Register prior to the meeting and, consistent with FACA requirements, will be open to the public.

c. Minutes. The proceedings will not be electronically recorded, but draft minutes of Committee meetings will be prepared by the facilitator for the convenience of the members of the Committee. Such minutes shall not be approved by the Committee, or be construed or taken to represent the official position of the Committee or any member on what transpired at Committee meetings.

d. Agendas. Meeting agendas will also be developed by consensus.

e. Impasse. If a deadlock or impasse is declared by any party, the facilitator will be available to help the deadlocked parties to try to resolve the impasse.

f. Caucus. Any party may declare a caucus at any time. The facilitator will be available to help in caucus activities.

## 7. SAFEGUARDS FOR THE PARTIES

a. Good Faith. All parties agree to act in good faith in all aspects of these negotiations. Specific offers, positions, or statements made during the negotiations may not be used by other parties for any purpose outside the negotiations or as a basis for future litigation. It is the intent of the Committee that other attendees of the Committee's meetings also voluntarily comply with this provision in order to support the regulatory negotiation process by encouraging the free and open exchange of ideas, views, and information prior to achieving consensus. Personal attacks and prejudiced statements will not be tolerated.

b. Right to Withdraw. Any party may withdraw from the negotiations at any time without prejudice. The remaining Committee Members shall then decide whether to continue the negotiations.

c. Others' Positions. No party will make public announcements or hold discussions with the press characterizing the position of any other party even if that party withdraws from the negotiations.

d. Information.

(1) All parties agree not to withhold relevant and non-proprietary information, recognizing that competitive concerns may make disclosure of certain information unlawful or competitively sensitive. If a party believes it cannot or should not release such information, it will provide the substance of the information in some form (such as by aggregating data, by deleting non-relevant confidential information, by providing summaries, or by furnishing it to a neutral consultant to use or abstract) or a general description of it and the reason for not providing it directly.

(2) Parties will provide information called for by this paragraph as much in advance of the meeting at which such information is to be used as is reasonably convenient.

(3) All parties agree not to divulge information that is not required to be included in the minutes and which is shared by others in confidence.

(4) Information and data provided to the Committee in writing is a matter of public record.

(5) Nothing contained in these protocols shall restrict the ability of any interest or member of the Committee to keep the Congress and other agencies of the Federal Government informed as to the substance and progress of the negotiations.

e. Docket. Minutes of meetings and any other documents prepared or circulated in conjunction with the negotiation shall be placed in a public docket of the negotiations.

# CHAPTER 7 - CONCLUDING THE NEGOTIATIONS

The negotiated rulemaking committee has finished its work when it reaches consensus on the issues under negotiation or when it decides that consensus cannot be reached on all or parts of the rule. In either event, the records kept of committee meetings should provide the agency with valuable information upon which to base the rule or its preamble.

The Reg-Neg Act requires a committee that reaches consensus on a proposed rule to transmit to the agency a report containing the proposed rule. (5 U.S.C. §566(f)) The Act provides that a committee not reaching consensus on a rule may transmit a report specifying any areas of agreement. The committee may include in its report any other information, recommendations, or materials that it considers appropriate. The Act allows any member of the committee to include additional information, recommendations, or other materials as an addendum to the report. The committee must also submit to the agency the minutes and other records required by sections 10(b) and (c) of the Federal Advisory Committee Act. (5 U.S.C. §566(g)) In general, committee records include documents that were prepared for or made available to the committee, but do not include personal notes and materials of the facilitator or members of the committee. (5 U.S.C. §566(d)(3))

The statutory language gives the committee and its members, including the agency, flexibility in deciding how to make best use of what has been achieved in the negotiations. For example, in some instances the committee may decide to submit to the agency -- or the agency may require -- a written summary of the results of the negotiations. Depending on the nature of any consensus that may be attained, the committee may transmit the agreements reached on each of the issues or it may be able to provide specific proposed language for the draft rule. The committee may prefer to have the members sign a statement agreeing not to oppose the rule, or they may decide that an oral agreement is all that is appropriate. The appendix includes examples of consensus statements issued by negotiating committees and examples of portions of Federal Register notices for proposed rules developed by regulatory negotiation.

If the committee is terminating its work without reaching consensus, it may wish to identify which issues (if any) it was able to resolve and which issues remained, a summary of the areas of disagreement, and the ranges of solutions discussed. Negotiations that do not end in consensus may nonetheless provide the agency with invaluable information about the parties and the issues, perhaps enabling the agency to propose a rule that is satisfactory to many of the parties. Agencies that have had negotiations end short of consensus have reported that the additional knowledge gained during the negotiations made the process worthwhile.

What the agency does with the results of the committee's negotiations depends in part on what the agency promised at the beginning of the negotiations and on what the committee transmits to the agency. If the committee's consensus is in the form of a draft rule and the agency promised (as, for example, the Environmental Protection Agency has) to publish the text of the committee's draft rule as a proposed rule, then the draft will go through internal review and concurrence, and Office of Management and Budget concurrence if required, prior to publication in the Federal Register. If the committee's consensus is in the form of recommendations on the issues, then the agency rulemaking staff will draft the rule based on the recommendations and will follow normal agency internal and external review procedures.

The agency, of course, always is responsible for ensuring that the rule is consistent with statutory requirements. Nothing the committee proposes can change the agency's statutory obligations. If, due to statutory requirements or as a result of internal agency review, significant changes are made to the rule prior to publication of the proposal, the committee members should be notified or briefed regarding the changes and the reasons for the changes. The Administrative Conference recommends also that the Federal Register notice make clear any departures in the text from the negotiated agreement.

Negotiated rulemaking proposals are subject to public comment in accordance with the Administrative Procedure Act (see chapter 3). The negotiating committee can either be disbanded at the conclusion of its formal negotiations (as is the practice of EPA), or it may continue to exist through the public comment period so that the agency can have the benefit of the committee's reactions to any comments received (the practice of the Department of Transportation). In the latter case, such consultations should take place in public (see chapter 3). The Reg-Neg Act allows the agency and the committee to decide when to terminate the committee, provided termination is no later than promulgation of the final rule under consideration. (5 U.S.C. §567)

Neil Eisner, Assistant General Counsel for Regulation and Enforcement at the Department of Transportation, has explained the Department's procedure as follows:

> [T]here is a strong argument for making it clear that the committee's work is not considered completed until it has made a recommendation on the final rule. We have found that it is easy for many people to sit around the table and make recommendations for a notice of proposed rulemaking, because it will then be subject to comment . . . . Having to `bite the bullet' and make recommendations for a final rule, based on public comment, is a much more difficult task, which is, I believe, one of the primary objectives of regulatory negotiation.
>
> (Letter to the Administrative Conference, Oct. 31, 1988)

The Administrative Conference has recommended that negotiations can be useful even after publication of a proposed rule. (See Recommendation 82-4, par. 13, 14; and Recommendation 85-5, par. 3. Both recommendations are reprinted in the appendix to chapter 1.) Nevertheless, the Conference endorses the idea that agencies should adapt the general framework of negotiated rulemaking to their own circumstances, and would not disagree with an agency that chooses to vary the procedure. (See the preamble to Recommendation 85-5.) In any event, members of the committee should be kept informed of the progress of the proposal. They should receive notice of publication, a summary of public comments, and notice when the final rule is published.

## Evaluation of the Rulemaking Effort

The agency may find it useful for agency staff, the facilitator, or another external neutral party to assess the effectiveness of the negotiated rulemaking proceeding. The assessment may include an evaluation of how well the reg-neg fulfilled the goals of the agency and the other participants, the degree of satisfaction among participants and agency management, the volume and tenor of public comment, and subsequent litigation if any. Documentation of lessons learned about what issues are negotiable, how much preparation must precede the negotiation, and what resources were needed to conduct the negotiation can be valuable aids for future negotiated rulemaking proceedings. The appendix to chapter 1 includes an evaluation of EPA's reg-neg experience by EPA's Office of Policy, Planning and Evaluation. Chapter 13 contains an assessment by Professor Henry H. Perritt, Jr., of the Occupational Safety and Health Administration's negotiated rulemaking on exposure to the chemical MDA. In 1995, at the request of EPA, the Administrative Conference undertook an evaluation of EPA's overall negotiated rulemaking experience. (At the time of publication in mid-1995, the study was still in progress.)

The Administrative Conference encourages agencies that conduct negotiated rulemaking to share their assessments and the lessons learned with other agencies. The Conference functions as a clearinghouse for information about administrative procedures, and agencies should submit such data to the Conference's Office of the Chairman. (5 U.S.C. §569) A comprehensive report on federal agency experience under the Reg-Neg Act was prepared by the Conference in 1995 for submission to Congress.

## Appendix

The appendix contains a variety of documents that illustrate forms of committee consensus agreements and agency Federal Register notices subsequent to the conclusion of negotiations.

The first three items are from EPA's woodburning stove reg-neg. The "notice of results of rulemaking negotiation" summarizes the consensus reached by the committee. It is somewhat unusual for an agency to publish such a notice in advance of a notice of proposed rulemaking (NPRM). (For another example, see OSHA's publication of advisory committee recommendations on the chemical MDA, 52 Fed. Reg. 26776, July 16, 1987.) In this instance, the notice was published primarily to inform manufacturers and dealers of the consensus to aid them in planning for design and marketing of stoves. The appendix contains a copy of the consensus agreement, which was signed by each of the parties to the negotiation. Excerpts from the NPRM are also reprinted.

The Federal Aviation Administration's NPRM on flight time limitations and its notice of a negotiating committee meeting subsequent to the comment period reflect a different procedure at the conclusion of negotiations. Unlike EPA, FAA chose to reconvene the committee in a public session to review the comments received by the agency. (See chapter 3 for a discussion of *ex parte* concerns.)

Also in the appendix is a letter from the mediators in OSHA's benzene proceeding summarizing the results of the negotiations. Finally, the appendix contains the report of the facilitator and excerpts from the committee's statement (agreed to by all but one of the participants) in EPA's RCRA permit modification reg-neg.

## 51 Fed. Reg. 34672 (Sept. 30, 1986)

**40 CFR Part 60**

**[AD-FRL-3088-2]**

### Standards of Performance For New Stationary Sources; Residential Wood Heaters

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of results of rulemaking negotiation.

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**SUMMARY:** On August 2, 1985, (50 FR 31504), the EPA announced that it planned to develop new source performance standards (NSPS) for residential wood combustion devices (wood heaters). On March 10, 1986 (51 FR 8241), the Agency announced the formation of an advisory committee, under the Federal Advisory Committee Act, to negotiate the issues associated with the development of this proposed standard. The committee has agreed in principle to the provisions of the regulation. This announcement summarizes these agreements. Parties affected by this rulemaking, primarily manufacturers of and dealers in wood heaters, may use information in this notice to complete planning for the design and marketing of clean-burning wood heaters. EPA plans to propose the regulation in January 1987 and promulgate a final standard in January 1988.

**ADDRESS:** Docket. A docket, number A–p84–49, containing information considered by EPA in development of the proposed standards, is available for public inspection between 8:00 a.m. and 4:00 p.m., Monday through Friday, at EPA's Central Docket Section (LE–131), West Tower Lobby, Gallery 1, 401 M Street SW., Washington, DC 20460. EPA may charge a reasonable fee for copying.

**FOR FURTHER INFORMATION CONTACT:** Rick Colyer, Standards Development Branch, telephone number (919) 541–5578; or Jeff Telander, Industrial Studies Branch, (919) 541–5595. The address for both is: Emission Standards and Engineering Division (MD–13), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711.

**SUPPLEMENTARY INFORMATION:**

### I. Background

The EPA estimates that over 12 million wood heaters were in use in 1986. As referred to here, wood heaters are closed-chambered, combustion air controlled appliances, such as freestanding woodstoves fireplace inserts, and wood burning cookstoves. The EPA estimates that sales of wood heaters are approximately 800,000 units per year.

The proposed regulation would set emission limits for particulate matter (PM) only. However, techniques which control PM, such as catalysis or secondary combustion, also reduce other pollutants found in wood smoke, such as carbon monoxide (CO), hydrocarbons, and polycyclic organic matter. The EPA projects substantial air quality benefits form the regulation of wood heaters. In the absence of a regulation, EPA estimates that PM emissions from new wood heaters would increase at a rate of about 110,000 megagrams (121,000 tons) per year. With controls, the estimated annual nationwide PM emissions would increase by approximately 31,000 megagrams (34,000 tons) per year, a reduction of more than 70 percent. These estimates are based upon assumptions regarding catalyst and noncatalyst emission control degradation as well as consumer behavior regarding proper operation and maintenance.

Wood heaters create significant air quality problems in localities where they are used in large numbers. Emissions from wood heaters are a growing problem throughout all areas of the country where wood supplies are abundant. In fact, several areas currently violate national health standards for PM and CO due, in part, to residential wood heaters.

During the past few years, several state and local governments have developed regulations controlling, and in some instances temporarily banning, wood heaters. On July 1, 1986, Oregon regulations went into effect prohibiting the sale of new wood heaters that are not state-certified. Similar regulations will go into effect in Colorado on January 1, 1987. Several local ordinances have been passed, mostly in the Rocky Mountains, to control or ban woodburing. Several other states are awaiting the development of a federal NSPS before deciding whether to regulate on their own.

The development of a federal NSPS for wood heaters began in 1985 as a response to the growing concern that wood smoke contributes to ambient air quality health problems. The Agency has agreed to conduct a wood heater NSPS rulemaking with a proposed decision by January 31, 1987, and a final decision by January 31, 1988. *New York* v. *Thomas*, No. 84–1472, etc. (D.C. Cir.) (Settlement Agreement of May 9, 1986).

After gauging the interest of the various parties in the development of this standard—the wood heating industry, state governments, environmental and consumer groups—EPA established a negotiating committee (under the Federal Advisory Committee Act) to negotiate the provisions of the standard. Appendix A of this notice identifies members of the negotiating committee. The Agency believes that the regulatory negotiation will reduce the time required to propose and promulgate this standard, will improve the quality of the regulation, and, by building consensus among parties at interest, will avoid litigation or delays.

Beginning on March 19, 1986, the regulatory negotiation committee met six times on a monthly basis to discuss and reach agreements on a variety of technical and policy issues associated with the development of the standard. At the final meeting of the committee on August 21, the committee reached agreement in principle on all major provisions of the standard. Formal ratification of the agreement is expected in the near future.

This notice describes the results of the negotiations and summarizes all of the major provisions of the negotiated agreement. This notice satisfies a commitment by the EPA to the negotiating committee to publish a description of the regulation as soon as possible after the completion of the negotiations. The purpose of this notice is to inform wood heater manufacturers and others affected (e.g., testing laboratories, dealers, catalyst manufacturers, and state and local governments) of the major requirements in the negotiated agreement—particularly what the standards would be, and when and to whom they would apply, if promulgated.

The Agency will formally propose the negotiated standard in January 1987, including a preamble that explains the proposed rule and its rationale, and satisfies the various administrative requirements associated with rulemaking.

The following section provides an overview of the key provisions of the standard that will be proposed. Appendix B contains two charts to help manufacturers determine whether they would be subject to the regulation and when and how they would be required to comply.

## II. Overview

In summary, the agreement would require manufacturers to certify each model line on the basis of tests conducted by an accredited laboratory on a representative wood heater. After July 1, 1988, unless otherwise exempted, all wood heaters produced would have to meet the Phase I emission limits and comply with temporary and permanent labeling requirements. More stringent emission limits would take effect on July 1, 1990 (Phase II). The program would be enforced through parameter inspections (to ensure that production line units conform to the appliance submitted for certification) and emission test audits.

Following is a section-by-section summary of the negotiated agreement.

### *A. Summary of Negotiated Rule*

Applicability

The rule would apply to all wood heaters manufactured or imported after July 1, 1988, and sold at retail after July 1, 1990. There would be several exemptions.

- Upon written request by the manufacturer, Oregon-certified appliances that meet certain criteria would be certified by EPA as being in compliance with the first phase of the standard. The primary criterion would be that the certification test included at least one test run at a burn rate less than 1.25 kg/hr.
- In the first year of the program (July 1, 1988, through June 30, 1989) small manufacturers would be allowed to produce a number of uncertified wood heaters equal to or fewer than the number they produced in the previous 12 months (base year). For this exemption, a small manufacturer is defined as one who produced fewer than 2000 wood heaters in the base year (July 1, 1987, through June 30, 1988). Records would have to be maintained by the manufacturer for this period to apply for this exemption.
- Appliances that are exported would not have to meet the standard.
- For each model line, up to 50 non-certified units could be produced for research and development purposes.

Definition

"Wood heater" is the term used in this standard for the type of woodburning appliances covered by the standard. "Wood heater" is defined as an enclosed, woodburning appliance capable of and intended for space heating, domestic water heating, or indoor cooking, that meets all of the following criteria:

1. An air-to-fuel ratio in the combustion chamber averaging less than 35-to-1 as determined by the test procedure prescribed in the rule;
2. A usable firebox volume of less than 20 cubic feet;
3. A minimum burn rate less than 5 kg/hr; and
4. A maximum weight of 1000 kg.

This definition would include all non-industrial indoor woodburning appliances except furnaces, boilers, and fireplaces. Coalburning heaters would be covered unless they met certain design criteria and were prominently labeled for coal use only.

Emission Limits and Compliance Dates

The rule would have two phases: wood heaters manufactured after July 1, 1988, or sold at retail after July 1, 1990, would have to meet certain particulate matter emission standards (Phase I); and wood heaters manufactured after July 1, 1990, or sold at retail after July 1, 1992, would have to meet more stringent particulate matter emission standards (Phase II). At each phase there would be an emission limit for catalytic wood heaters and another for noncatalytic wood heaters. The particulate matter emission limits would be as follows:

| | Phase I (July 1, 1988–June 30, 1990) | Phase II (beginning July 1, 1990) |
|---|---|---|
| Catalytic | 5.5 grams/hour | 4.1 grams/hour. |
| Noncatalytic | 8.5 grams/hour | 7.5 grams/hour. |

The particulate matter emissions from a particular wood heater would be measured during an emission test consisting of four test runs at prescribed burn rates. The average emissions at the four burn rates would be calculated using a formula which would give higher weight to emissions at the lower burn rates.

Emissions at lower burn rates are given more weight in the formula because consumers tend to operate wood heaters at the lower burn rates more than at the higher burn rates. To pass the emissions test, a wood heater's calculated average emissions would have to be equal to or less than the applicable emission limit.

The NSPS 1988 particulate emission limits would be approximately equivalent to the Oregon 1988 emission limits. Because the emissions weighting formula used in the NSPS standard is different from the weighting formula in the Oregon standard, the numerical expressions of the standard are different.

The Phase II emission limits would be approximately 15 to 25 percent more stringent than the 1988 standards for noncatalyst and catalyst wood heaters, respectively. The 1990 standards would also include a emission cap. A cap is a maximum allowable emission limit for any burn rate. It is designed to ensure that the appliance burns cleanly across the range of burn rates.

The 1990 cap for catalyst wood heaters is a function of burn rate and is calculated by the following:

For burn rates $<2.82$ kg/hr,
  Cap $= 3.55$ g/k × (burn rate) $+ 4.98$ g/hr
For burn rates $>2.82$ kg/hr,
  Cap $= 15$ g/hr.

The 1990 cap for noncatalyst wood heaters is 15 g/hr for burn rates less than or equal to 1.5 kg/hr and 18 g/hr for burn rates greater than 1.5 kg/hr.

### Test Methods and Procedures

Any of the following particulate measuring methods would be permitted: EPA versions of the proposed ASTM Method, Oregon Method 7 in the stack, and Oregon Method 7 in a dilution tunnel. The method would specify how to test the appliance, including the loading and arrangement of fire wood, the selection of burn rates, the method for averaging individual test runs, and the treatment of outlying data points. Certification tests would have to include one run at or below a burn rate of 1.25 kg/hr and 1.0 kg/hr for the 1988 and 1990 standards, respectively.

### Certification and Compliance

This standard would contain a certification program similar to that used in EPA's motor vehicle emission control program. A prototype, or production unit, that is representative of all others within a model line would be tested by an EPA-accredited testing laboratory. If the test results indicate that the unit meets the applicable emission limits, EPA would issue a certificate covering the entire model line to the manufacturer, who may then sell all units in that model line as long as that certificate is in effect.

In addition to the test results, the manufacturer would be required to submit an application that includes certain descriptive data. If the appliance is equipped with a catalyst, the catalyst would have to be warranted in full for at least two years and, beginning July 1, 1990, for at least three years for thermal degradation. Also, the catalyst would have to be easily accessible for inspection and replacement.

EPA would allow an alternative certification procedure for manufacturers who may be unable to obtain certification as a result of a projected six-month delay in getting the appliance tested at accredited laboratories and getting the application processed by EPA.

Manufacturers would also be required to conduct quality assurance (QA) programs consisting of parameter inspections and emission tests. For every 150 wood heaters produced, the manufacturer would be required to inspect at least one wood heater to ensure that dimensions of certain components fall within specified tolerances. Also, the manufacturer would be required to conduct emission tests on production units at a frequency that depends upon the number of units produced and the original certification test results. The manufacturer would not be required to report the results of the QA programs to EPA, but would have to maintain these records.

Test results could be corrected for altitude in the cases of alternative certification and QA programs. A formula will be provided to calculate the appropriate correction.

A firm manufacturing appliances similar in all material respects to appliances manufactured by another firm that has already certified the design could obtain a certificate without retesting. Unless revoked, certificates issued to wood heaters meeting the 1988 standards would be good until 1990, and certificates issued to wood heaters meeting the 1990 standards would be good for five years. A manufacturer would have to retest and recertify a model line if he makes physical changes to the design that are presumed to affect emissions.

Certain conditions, such as an enforcement or compliance audit failure, could result in the suspension or revocation of the certificate. Audits would consist of two elements: parameter inspections and emission testing. These audits would be performed on production units prior to retail sale. EPA would conduct both random and selective enforcement audit testing programs. The rule will provide for notification and hearing procedures when EPA is considering suspending or revoking a certificate.

### Laboratory Accreditation

To be accredited by EPA, a testing laboratory would have to first be accredited by the National Voluntary Laboratory Accreditation program, demonstrate proficiency in testing by participating in an annual round robin, be free of conflict of interest regarding the testing results, and agree to establish an escrow account and pay into it funds sufficient for one audit test for every five certification tests conducted by the laboratory. Laboratories accredited by Oregon may be grandfathered, provided that they participate in the annual round robin testing and establish an escrow account. The funds in the escrow account would be used to audit wood heaters certified to meet the 1990 (Phase II) standard.

### Labeling and Owner's Manual

All appliances subject to the standard and offered for sale would be required to display both a temporary label and a permanent label. The label contents, location, size, and materials will be specified. In general, the temporary label is designed to help the prospective purchaser select an appliance by providing information on relative pollution output, efficiency, and heat output. The permanent label would contain information relevant to EPA enforcement. Manufacturers would be required to provide operation and maintenance information necessary for good emissions control in the owner's manual that accompanies the appliance.

### Recordkeeping and Reporting

Manufacturers would be required to maintain records of certification testing data, QA program results, production volumes, names and addresses of purchasers, and information needed to support a request for a waiver or exemption. Accredited laboratories would have to keep testing records and report periodically to EPA certain information required under logjam provisions. Retailers would have to maintain names and addresses of purchasers. All records would have to be retained for at least five years.

### List of Subjects in 40 CFR Part 60

Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements, Incorporation by reference, Wood heaters (SIC Code 3433).

Dated: September 24, 1986.

**J. Craig Potter,**

*Assistant Administrator for Air and Radiation.*

### Appendix A—Regulatory Negotiation Participant List

*Negotiators/Affiliation*

1. Robert Ajax, U.S. EPA
2. William Becker, STAPPA/ALAPCO
3. Larry Canaday, Woodcutters Mfg.
4. John Charles, Oregon Environmental Council
5. Donnis Corn, a-b Fabricators, Inc.
6. David Doniger, Natural Resources Defense Council, Inc.
7. Harold Garabedian, Vermont Air Pollution Control Program
8. Robert Geiter, Applied Ceramics
9. R. D. Gros Jean, Corning Glass Works
10. Brad Hollman, New York State Energy Research and Development Authority and New York State Energy Office
11. Jim King, Colorado Department of Health
12. John Kowalczyk, Oregon Department of Environmental Quality
13. Neil Martin, Brugger Exports, Ltd.
14. David Menotti, Wood Heating Alliance
15. Jay W. Shelton, Shelton Research, Inc.
16. David Swankin, Consumer Federation of America

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*Facilitator*

Phil Harter, Esq., Consultant to EPA

*Executive Secretary*

Chris Kirtz, U.S. EPA

*Observers*

Wayne Leiss, Office of Management and Budget
George J. Lippert, U.S. Forest Service
Jean Vernet, U.S. Department of Energy

BILLING CODE 6560-50-M

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November 7, 1986

## ENVIRONMENTAL PROTECTION AGENCY
## NEGOTIATING COMMITTEE
## FOR
## NEW SOURCE PERFORMANCE STANDARD FOR RESIDENTIAL WOOD HEATERS

## AGREEMENT

The Negotiating Committee considered the technical and policy issues involved in a new source performance standard for residential wood heaters and has reached a consensus on a recommended proposed rule.

U.S. Environmental Protection Agency, a party to the negotiations, agrees that:

1. The person signing this document is authorized to commit the organization to the terms of the agreement.

2. It concurs in the recommended proposed rule entitled "Recommended Proposed Rules -- Residential Wood Heater NSPS" that is dated "10/24/86" and that is attached to this agreement when considered as a whole.

3. a. EPA agrees to draft a preamble consistent with the recommended proposed rule and to publish that preamble and the recommended proposed rule as a Notice of Proposed Rulemaking for a New Source Performance Standard for Residential Wood Heaters.

   b. If the proposed rule and its preamble are consistent with the recommended proposed rule, each other party agrees not to file negative comments in response to the Notice of Proposed Rulemaking and to file a memorandum in the docket that it participated in the negotiations and that it concurred in the recommended proposed rule when considered as a whole.

4. a. EPA will consider all relevant comments submitted in response to the Notice of Proposed Rulemaking and will make such modifications in the proposal as are necessary when issuing a final rule.

   b. Each other party agrees not take any action to inhibit the adoption of the recommended proposed rule as a final rule.

5. Each party other than EPA agrees not to challenge the final rule in court if the final rule and its preamble are consistent with the recommended proposed rule.

7

6. If the final rule is challenged in court and if the preamble and final rule are consistent with the recommended proposed rule, then each party other than EPA agrees to file a memorandum informing the court that it participated in the negotiations and that it concurred in the recommended proposed rule when considered as a whole.

7. This agreement takes effect when all members of the Negotiating Committee have signed it.

Robert L. Ajax
Individual Committee Member

U.S. EPA
Organization

November 13, 1986
Date

## 52 Fed. Reg. 4994 (Feb. 18, 1987)

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 60**

**[AD-FRL-3138-7(b)]**

### Standards of Performance for New Stationary Sources; Standards of Performance for New Sources; Residential Wood Heaters

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule and notice of public hearing.

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**SUMMARY:** The proposed standards would limit particulate matter (PM) emissions from new residential wood heaters. The proposed standards were developed through the process of regulatory negotiation. They implement Section 111 of the Clean Air Act and are based upon the Administrator's determination that wood heaters cause, or contribute significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare. The proposed standards would require wood heaters manufactured on or after July 1, 1988, be capable of reducing emissions to the level achievable by the best demonstrated system of continuous emission reduction, considering costs, nonair quality health and environmental impacts, and energy requirements.

If requested, a public hearing will be held to provide interested parties an opportunity for oral presentations of data, views, or arguments concerning the proposed standards.

**DATES:** *Comments.* Comments must be received on or before April 20, 1987.

*Public Hearing.* If anyone contacts EPA requesting to speak at a public hearing by March 11, 1987, a public hearing will be held on April 6, 1987, beginning at 10:00 a.m. Persons interested in attending the hearing should call Ms. Ann Eleanor at the phone number listed under For Further Information Contact to verify that a hearing will be held.

*Request to Speak at Public Hearing.* Persons wishing to present oral testimony must contact EPA by March 11, 1987.

**ADDRESSES:** *Comments.* Comments should be submitted (in duplicate if possible) to: Central Docket Section (LE-131), Attention Docket Number A-84-49, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460.

*Public Hearing.* If anyone contacts EPA requesting a public hearing, it will be held at EPA's Office of Administration Auditorium, Research Triangle Park, North Carolina. Persons interested in attending the hearing or wishing to present oral testimony should notify Ms. Ann Eleanor, Standards Development Branch (MD-13), U. S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, at the phone number listed under **FOR FURTHER INFORMATION CONTACT.**

*Docket.* Docket No. A-84-49, containing supporting information used in developing the proposed standards, is available for public inspection and copying between 8:00 a.m. and 4:00 p.m., Monday through Friday, at EPA's Central Docket Section, West Tower Lobby, Gallery 1, Waterside Mall, 401 M Street SW., Washington, DC 20460. A reasonable fee may be charged for copying.

**FOR FURTHER INFORMATION CONTACT:** For questions concerning regulatory aspects of the standards, please contact Rick Colyer, Standards Development Branch, telephone number (919) 541-5578. For questions concerning technical aspects of the standards, please contact Jeff Telander, Industrial Studies Branch, (919) 541-5595. For questions concerning test methods and laboratory accreditation, please contact George Walsh, Emission Measurement Branch, (919) 541-5543. The address for each is: Emission Standards and Engineering Division (MD-13), U. S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711. For questions concerning wood heater certification and enforcement, please contact Doreen Cantor, (202) 382–2874, at the following address: Stationary Source Compliance Division (EN–341), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460.

Persons interested in attending the public hearing or persons wishing to present oral testimony must notify Ms. Ann Eleanor at (919) 541–5578.

**SUPPLEMENTARY INFORMATION:**

## I. Introduction

### *A. New Source Performance Standards—General*

New Source Performance Standards (NSPS or "standards") implement Section 111 of the Clean Air Act. NSPS are issued for categories of sources which cause, or contribute significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare. They apply to new stationary sources of emissions, i.e., sources whose construction, reconstruction, or modification begins after the applicability date of the standard.

An NSPS requires these sources to control emissions to the level achievable by "best demonstrated technology," or "BDT," which is defined in item B.3 below.

### *B. Typical NSPS Decision Scheme*

An NSPS is the product of a series of decisions related to certain key elements for the source category being considered for regulation. The elements identified in this "decision scheme" are generally the following:

1. Source category to be regulated—usually an entire industry but can be a process or group of processes within an industry.
2. Pollutant(s) to be regulated—the particular substance(s) emitted by the source that the standard will control.
3. Best demonstrated technology—the technology on which the Agency will base the standards, i.e.,

> * * * the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated. (Section 111(a)(1))

For convenience, this will be referred to as "best demonstrated technology" or "BDT."

4. Affected facility—the pieces or groups of equipment that comprise the sources to which the standards will apply.
5. Format for the standards—the form in which the standards are expressed, e.g., as a percent reduction in emissions, as a pollutant concentration, or as an equipment standard.
6. Actual standards—based on what BDT can achieve, the maximum permissible emissions. (Note.—In general, standards do not require that a specific technology be used to achieve them. The source owner/operator may select the method for achieving the pollution control required.)
7. Other considerations—In addition, NSPS often include: modification/reconstruction considerations, monitoring requirements, performance test methods, and reporting and recordkeeping requirements.

### *C. Overview of This Preamble This preamble will:*

1. Discuss the aspects of this NSPS that set it apart from other NSPS.
2. Summarize the important features of this NSPS by discussing the conclusions reached with respect to the decision scheme.
3. Describe the environmental, energy, and economic impacts of this NSPS.

4995

4. Describe the background to this standard.
5. Present a rationale for each of the decisions in the decision scheme and provisions of the standard.
6. Discuss administrative requirements relevant to this action.

### *D. Unique Aspects of This NSPS*

Two factors make this NSPS unique. First, the source category to be regulated, residential wood-fired heaters, are mass-produced consumer items, rather than industrial processes typically regulated by an NSPS. Because wood heaters are mass-produced consumer items, a compliance scheme requiring that each facility be tested would be very costly. (The cost of a test series is several times the cost of a typical wood heater). Therefore, this standard permits the manufacturers of wood heaters to avoid having each unit tested by allowing, as an alternative, a certification program whereby representative wood heaters are tested. If the representative wood heater meets the applicable emission limits, EPA would certify the entire model line. Individual wood heaters within the model line would be subject to labeling and operational requirements. Manufacturers would then be required to conduct a quality assurance program to ensure that appliances produced within a model line conformed to the certified design, and met applicable emission limits. EPA also would conduct audits to ensure compliance.

The second unique aspect of this standard is the means by which it was developed. This NSPS was developed through the process of regulatory negotiation, an alternative process for developing regulations in which individuals and groups with negotiable interests directly affected by the standard work with EPA in a cooperative venture to develop a standard by committee agreement. The rule, as presented in this proposal, reflects a consensus of representatives of the wood heater industry, the environmental community, consumer groups, state air pollution control and energy agencies, and the EPA.

It is important to note, however, that the parties to the negotiation concurred with the regulation, when considered as a whole. Inevitably in any negotiation, this means that some parties may have made concessions in one area, in exchange for concessions from other parties in other areas. As a result, it is difficult to assess how changes in particular parts of the proposed rule would affect the consensus.

Members of the negotiation committee and their affiliation are as follows:

**Negotiators/Affiliation**

1. Robert Ajax, U.S. EPA
2. William Becker, STAPPA/ALAPCO
3. Larry Canaday, Woodcutters Mfg.
4. John Charles, Oregon Environmental Council
5. Donnis Corn, a-b Fabricators, Inc.
6. David Doniger, Natural Resources Defense Council, Inc.
7. Harold Garabedian, Vermont Air Pollution Control Program
8. Robert Geiter, Applied Ceramics
9. R.D. Gros Jean, Corning Glass Works
10. Brad Holloman, New York State Energy Research & Development Authority and New York State Energy Office
11. Jim King, Colorado Department of Health
12. John Kowalczyk, Oregon Department of Environmental Quality
13. Neil Martin, Brugger Exports, Ltd.
14. David Menotti, Wood Heating Alliance
15. Jay W. Shelton, Shelton Research, Inc.
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**Observers**

Wayne Leiss, Office of Management and Budget
George J. Lippert, U.S. Forest Service
Jean Vernet, U.S. Department of Energy

## II. Summary of the NSPS

### *A. Source Category To Be Regulated*

This NSPS would regulate new residential wood heaters.

### *B. Pollutant To Be Regulated*

This NSPS would regulate particulate matter (PM).

### *C. Affected Facility*

A "wood heater" would be defined as an enclosed, woodburning appliance used for space heating, domestic water heating, or indoor cooking that meets all of the following criteria:

1. An air-to-fuel ratio averaging less than 35-to-1,

2. Firebox volume less than 20 cubic feet,

3. Minimum burn rate less than 5 kg/hr, and

4. Maximum weight of less than 800 kg.

The regulation explicitly excludes furnaces, boilers, and open fireplaces.

### *D. Best Demonstrated Technology*

Two technologies are BDT for this source category: Catalytic technology and low-emitting noncatalytic technology.

### *E. Format for the Standards*

The emission limit would be expressed in grams of PM per hour (g/hr).

### *F. Emission Limits and Compliance Dates*

The rule would have two phases: wood heaters manufactured on or after July 1, 1988, or sold at retail on or after July 1, 1990, would have to meet certain particulate matter emission standards (Phase I); wood heaters manufactured on or after July 1, 1990, or sold at retail on or after July 1, 1992, would have to meet more stringent particulate matter emission standards (Phase II). For each phase there would be separate emission limits for catalytic wood heaters and for noncatalytic wood heaters as specified in Table 1.

TABLE 1.—WOOD HEATER EMISSION LIMITS

| | Phase I (July 1, 1988–June 30, 1990) | Phase II (beginning July 1, 1990) |
|---|---|---|
| Catalytic | 5.5 grams/hour | 4.1 grams/hour. |
| Noncatalytic | 8.5 grams/hour | 7.5 grams/hour. |

The Phase I emission limits are about the same as the 1988 emission limits in Oregon. Because the emission weighting formula used in this standard is different from the weighting formula in the Oregon standard, the numerical expression of the standard is different. For perspective, the numerical value of the Phase II emission limits are about 15 and 25 percent lower than the 1988 Oregon standards for noncatalyst and catalyst wood heaters, respectively, and also limit allowable emissions at any burn rate (i.e., a cap).

The 1990 cap for catalyst wood heaters is a function of burn rate (dry basis) and is calculated by the following:

- For burn rates $<$2.82 kg/hr, Cap$=$3.55 g/kg$\times$(burn rate)$+$4.98 g/hr
- For burn rates$>$2.82 kg/hr, Cap$=$15 g/hr.

The 1990 cap for noncatalyst wood heaters is 15 g/hr for burn rates less than or equal to 1.5 kg/hr and 18 g/hr for burn rates greater than 1.5 kg/hr.

### *G. Modification/Reconstruction Considerations*

Modification or reconstruction, as defined in § 60.14 and § 60.15 of Subpart A, shall not, by itself, make a wood heater an affected facility under this subpart. A "modification" is a physical or operational change to an existing facility, in this case built before July 1, 1988, that would result in an increase in the emission rate. "Reconstruction" means the replacement of components of an existing facility to the extent that the fixed capital cost of the new components exceeds 50 percent of the fixed capital cost needed to construct a comparable entirely new facility. Under the proposed rule, neither "modification" nor "reconstruction" of a unit built before July 1, 1988, would make that unit subject to the standards. On the other hand, a unit otherwise subject to them would remain subject, even if it were "modified" or "reconstructed."

4996

### *H. Certification Testing*

As an alternative to requiring that each wood heater be tested for compliance, a manufacturer may elect to have an entire model line certified. To obtain a certificate of compliance the manufacturer must submit for testing a wood heater which is representative of a model line to an EPA-accredited laboratory. If the representative wood heater meets the emission limits, the entire model line would be certified. Compliance with the emission limits would be demonstrated by meeting the composite or weighted average emission limit and by meeting, in addition, for Phase II, the individual caps at each of at least four burn rates. Applications for certification may be submitted at any time, but those received before July 1, 1988, may be considered under either the proposed or promulgated requirements, at the applicant's option. Additional and revised promulgated requirements would not apply retroactively.

### *I. Test Methods and Procedures*

Procedures for loading the test fuel, for setting up the wood heater, for operating the wood heater, and for conducting the emissions and efficiency tests are specified in the regulation. Several equivalent methods for measuring PM would be permitted in the regulation. Efficiency testing would be optional.

### *J. Accreditation Procedures*

Certification testing would be conducted by EPA-accredited laboratories and laboratories accredited by Oregon and exempted under this regulation's grandfather provisions. EPA would accredit laboratories based upon their demonstrated proficiency and upon specified criteria. Applications for accreditation may be submitted at any time, and those received before July 1, 1988, may be considered under either the proposed or promulgated requirements, at the applicant's option. Additional and revised promulgated requirements would not apply retroactively.

### *K. Compliance Scheme*

Unless exempted, all model lines would have to be covered by a certificate of compliance, or each wood heater would have to be individually tested. All wood heaters affected by this standard would be labeled to indicate their compliance status and to provide comparative performance information for consumers. Enforcement would include: (1) Inspections at the retail level to ensure that all wood heaters are properly labeled, (2) parameter inspections to ensure that components of the manufactured units conform to the representative wood heater submitted for testing, and (3) emission audit testing to ensure that the model line meets the emission limits.

### *L. Labeling and Owner's Manual*

All appliances subject to the standard and offered for sale would be required to display both a temporary label and a permanent label. In general, the temporary label would help the prospective purchaser select an appliance by providing information on relative pollution output, efficiency, and heat output. The permanent label would contain information relevant to compliance and applicability. Manufacturers would be required to provide operation and maintenance information necessary for good emissions control in the owner's manual that accompanies the appliance.

### *M. Catalyst Warranty Requirements*

If the wood heater is equipped with a catalyst, the catalyst would have to be guaranteed in full for at least two years and, beginning July 1, 1990, for at least three years for thermal degradation of the substrate. Also, the catalyst would have to be easily accessible for inspection and replacement.

### *N. Manufacturer Quality Assurance*

Manufacturers would be required to conduct a quality assurance (QA) program consisting of both parameter inspections and emissions testing.

### *O. Alternative Certification*

EPA would allow an alternative certification procedure for manufacturers who may be unable to obtain certification in the event that EPA determines that the time for getting appliances tested at accredited laboratories and getting applications processed by EPA exceeds six months.

### *P. Recordkeeping and Reporting*

Manufacturers would be required to maintain records of certification testing data, QA program results, production volumes, names and addresses of purchasers, and information needed to support a request for a waiver or exemption. Accredited laboratories would have to keep testing records and report periodically to EPA certain information required under alternative certification provisions. Retailers would have to maintain names and addresses of purchasers. All records would have to be retained for at least five years.

### III. Impacts of this NSPS

EPA used a wood stove demand simulation model to estimate the anticipated nationwide impacts of this NSPS. This computer model assumes households will attempt to minimize the cost of wood heat over the lifetime of the heater. It also assumes that, independent of the impacts of this regulation, wood heater sales volume would continue at about the same rate as in 1985. Using a variety of inputs such as the price of firewood, the price of various types of wood heaters, and wood heater sales volumes, the model projects on a regional and household/income basis, changes in sales, emissions, wood use, and heating costs that will occur as a result of this regulation. From these data, nationwide impacts were developed on air pollution, energy and control costs, and various economic effects in the fifth year after the regulation takes effect and compared with the impacts that would have occurred in the absence of regulation.

#### *A. Air*

Particulate emissions from wood heaters are a function of the method of measurement. Emission estimates based on laboratory tests have been made for both uncontrolled and controlled wood heaters. Based on a total particulate catch using EPA's Modified Method 5 (MM5) discussed in the Sampling Methods section, a typical conventional wood heater emits about 60 to 70 g/hr of PM. Catalytic and noncatalytic wood heaters complying with the 1988 standards would emit at least 82 and 72 percent less, respectively. Although catalytic wood heaters achieve greater emission reductions initially, presumed deterioration of the catalysts over time are estimated to result in emissions from catalytic wood heaters over their useful lifetimes approximately equal to noncatalytic wood heaters. Catalytic and noncatalytic wood heaters complying with the 1990 standards would emit at least 86 and 75 percent less, respectively, than conventional wood heaters. The numerical emission limits in the regulation, however, are based on PM measurements using the Oregon Method 7, also described in the Sampling Methods section, which measures roughly half the emissions of MM5.

Assuming that: (1) The price increases resulting from the standard would be on the order of $120 to $200 per appliance, (2) manufacturers would offer a mix of catalytic and noncatalytic wood heaters, (3) the initial emissions control efficiency of a catalyst may deteriorate over time, and (4) some wood heaters will be exempted for a year, EPA projects that the nationwide PM emission reduction in the fifth year is 395 Gigagrams (Gg) per year (or 436,000 tons per year), as shown in Table 2. It is important to note that all of the fifth year impact data refer only to wood heaters manufactured on or after July 1, 1988, or sold on or after July 1, 1990. Wood heaters manufactured before July 1, 1988, and sold before July 1, 1990, would not be affected by this regulation.

Although no emission reduction estimates have been made for pollutants other than PM, the control techniques used to reduce PM emissions are known to reduce carbon monoxide (CO) and polycyclic organic matter (POM) emissions as well. POM is a class of compounds containing carcinogens.

#### *B. Other Environmental Impacts*

This NSPS is anticipated to have no impacts or only negligible impacts on water quality or quantity, waste disposal, radiation, or noise. The increased wood heater efficiencies are expected to result in reduced wood consumption thereby saving timber and preserving woodlands and vegetation for aesthetics, erosion control, and ecological needs.

#### *C. Health and Welfare Impacts*

Health effects associated with exposure to wood heater PM include both mortality and morbidity resulting from respiratory disease, cardiovascular disease, and some risk of carcinogenesis. Welfare effects of wood heater PM emissions include soiling and materials damage to residences. Depending on the dispersion characteristics of the PM emissions, soiling and materials damage may also occur to commercial, industrial, governmental, and institutional facilities. Wood heater PM emissions also adversely affect visibility. The State of Oregon's regulation on woodstove PM emissions was prompted, in part, by the degradation in regional visibility. Table 2 includes a rough estimate of the dollar value benefits of reducing the mortality, morbidity, and household soiling and materials damage associated with the PM emission reduction due to the regulation. In addition to the health benefits of reduced air pollution, this standard is expected to reduce creosote deposition. Creosote deposition is the principal contributor to chimney fires. In 1984, 126,000 residential fires were attributed to wood heat, claiming 140 lives. Thirty percent of these fires were thought to have started in the chimney.

*D. Energy Impacts*

The increased efficiency of wood heaters is estimated to reduce demand for firewood by about 700,000 cords in the fifth year.

*E. Cost Impacts*

Many consumers would purchase more technically advanced wood heaters than they would have in the absence of the NSPS, and would therefore pay up to 25 percent more than they would for a conventional wood heater. Catalytic and noncatalytic wood heaters are, on average, about $200 and $120 more expensive, respectively, than conventional wood heaters. However, on average, this additional expense will be more than offset by cost savings from the need for less firewood and for fewer chimney cleanings over the life of the heater. Nationally, in the fifth year, there is a projected net savings of $29 million because of these offsetting benefits.

*F. Economic Effects*

The regulation is projected to result in a 5 percent decrease in sales in the first year when the exemption for the smallest firms is in force. A 7 percent decrease compared to the no regulation case is projected for the second year. In the long run, the decrease is expected to be about 5 percent. This decrease is expected to result, in part, in some manufacturers ceasing wood heater production, and others reducing it. It is not possible at this time to quantify this impact. In the long run, the regulation is anticipated to have no appreciable effect on the price of catalytic and noncatalytic low emitting stoves. Two important but unquantified impacts of the regulation are a potential increase in the development of the lower emitting heater technology and an increase in the spread of consumer information concerning this new technology.

TABLE 2. FIFTH YEAR NATIONWIDE IMPACTS SUMMARY

| | Costs (savings) ($$10^6$) | Emissions (Gg/yr) | Number of wood heaters sold ($10^3$) | Cords of wood ($10^6$) | Health and welfare benefits ($$10^6$) |
|---|---|---|---|---|---|
| No regulation (baseline) | | 549 | 800 | 10.1 | |
| NSPS | (29) | 154 | 757 | 9.4 | 1,500 |

## IV. Background to Standard

As discussed elsewhere in today's **Federal Register**, EPA is listing residential wood heaters based on its determination that wood heaters cause, or contribute significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.

During the past few years, several State and local governments have developed regulations controlling, and in some instances temporarily banning, wood heaters. On July 1, 1986, Oregon regulations went into effect prohibiting the sale of new wood heaters that are not state-certified. Similar regulations went into effect in Colorado on January 1, 1987. Several local ordinances have been passed, mostly in the Rocky Mountains, to control or ban woodburning. Several other States are awaiting the development of a Federal NSPS before deciding whether to regulate on their own.

The development of a Federal NSPS for wood heaters began in 1985 as a response to the growing concern that wood smoke contributes to ambient air quality related health problems. In response to a lawsuit filed by the State of New York and the Natural Resources Defense Council (NRDC), the Agency agreed to conduct a wood heater NSPS rulemaking with a schedule calling for final action by January 31, 1988. *New York* v. *Thomas*, Nos. 84–1472, etc. (D.C. Cir.) (Settlement Agreement of May 9, 1986).

After communicating with the various parties interested in the development of this standard—the wood heating industry, State governments, environmental and consumer groups—EPA established a negotiating committee under the Federal Advisory Committee Act to negotiate the provisions of the standard.

Beginning on March 19, 1986, the regulatory negotiation committee met six times on a monthly basis to discuss and reach agreements on a variety of technical and policy issues associated with the development of the standard. At the final meeting of the committee on August 21, 1986, the committee reached agreement in principle on all major provisions of the standard and, in December, the standard that is being proposed today was formally agreed to by all parties.

## V. Rationale for Proposed Standards

The purpose of this section is to (1) explain briefly the issues negotiated by the committee, (2) describe the resolutions reached by the committee, (3) present the rationale for these resolutions. EPA cautions that its explanation of the reasons for particular committee decisions may not always reflect the reason why each individual committee member agreed to a particular provision of the regulation.

## 49 Fed. Reg. 12136 (Mar. 28, 1984)

**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Parts 121 and 135**

**[Docket No. 23634; Notice No. 84-3]**

### Flight Time Limitations and Rest Requirements for Flight Crewmembers

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

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**SUMMARY:** The FAA is proposing flight time limitations and rest requirements for flight crewmembers engaged in air transportation. This proposal is based on the recommendations of a regulatory negotiation advisory committee composed of persons who represent the interests affected by the flight time rules. This proposal results from a reassessment of the agency's role in regulating flight and rest time in light of current operating conditions and current regulatory phlosophy. The proposal would simplify, clarify, and update the regulations and reduce the need for their interpretation.

**DATE:** Comments must be received on or before May 14, 1984.

**ADDRESS:** Comments on the proposal may be mailed in duplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rules Docket (AGC-204), Docket No. 23634, 800 Independence Avenue SW., Washington, D.C. 20591; or delivered to: Room 915G, 800 Independence Avenue, SW., Washington, D.C. Comments may be examined in the Rules Docket on weekdays, except Federal holidays, between 8:30 a.m. and 5:00 p.m.

**FOR FURTHER INFORMATION CONTACT:** Lawrence P. Bedore, Project Development Branch, Air Transportation Division, Office of Flight Operations, Federal Aviation Administration, Room 304, 800 Independence Avenue SW., Washington D.C. 20591; Telephone (202) 426-8096.

**SUPPLEMENTARY INFORMATION:** .

### Comments

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments and by commenting on the possible environmental, energy, or economic impact of the adoption of this proposal. Comments are also specifically requested concerning the implementation and effective date of the final rule. For example, the FAA would like to know if operators want the option of complying before the mandatory effective date. The FAA proposes to establish an effective date of 180 days after the publication of the final rule in the Federal Register.

The comment should carry the regulatory docket or notice number and be submitted in duplicate to the address above. All comments received as well as a report summarizing any substantive public contact with FAA personnel on this rulemaking will be filed in the docket. The docket is available for public inspection both before and after the closing date for making comments.

Before taking any final action on this proposal, the Administrator will consider the comments made on or before May 14, 1984 and the proposal may be changed in light of the comments received. The FAA is allowing only 45 days for comment on this NPRM, because notwithstanding the significance of the issues involved, the FAA believes that this is sufficient time given the length of and the accomplishments of the Regulatory Negotiation Advisory Committee sessions.

The FAA will acknowledge receipt of a comment if the commenter includes a self-addressed, stamped postcard with the comment. The postcard should be marked "Comments to Docket No. 23634." When the comment is received by the FAA, the postcard will be dated, time stamped, and returned to the commenter.

### Availability of The NPRM

Any person may obtain a copy of this notice of proposed rulemaking (NPRM) by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Information Center, APA–430, 800 Independence Avenue SW., Washington, D.C. 20591, or by calling (202) 426–8058. Communications must identify the notice number of the NPRM wanted. Anyone interested in being placed on a mailing list for future FAA NPRM's should also request a copy of Advisory Circular No. 11–2 which describes how to apply to be on the mailing list.

### Background

The Federal Aviation Act of 1958 (49 U.S.C. 1351 et. seq.) requires the Administrator of the Federal Aviation Administration to issue "reasonable rules and regulations governing, in the interest of safety, the maximum hours or periods of service of aircrew and other employees of air carriers." The rules issued by the FAA under this provision are generally referred to as "flight time limitations." The flight time limitation rules that apply to the major scheduled airlines—those most familiar to the traveling public—are contained in Part 121 of the Federal Aviation Regulations (14 CFR Part 121). These rules contain daily rest requirements for certain operations and weekly, monthly, and annual limits on the number of hours of flight time.

The flight time limitation rules that apply to the fast growing scheduled airlines that operate airplanes of 30 or less seats (commonly referred to as "commuters") and air taxi operations are contained in Part 135 of the Federal Aviation Regulations (14 CFR Part 135). These rules contain daily rest requirements as well as daily limits on the number of hours of flight time but do not contain weekly, monthly, or annual limits. The Airline Deregulation Act of 1978 requires the Administrator, among other things, to "impose requirements upon * * * commuter air carriers to assure that the level of safety provided to persons traveling on such commuter air carriers is, to the maximum feasible extent, equivalent to the level of safety provided to persons traveling" on Part 121 air carriers.

Despite changes in the airline transportation industry over the past 30 years, the rules governing flight time limits and rest requirements have remained virtually unchanged. No safety reasons have been presented which have necessitated changes to the regulations. But the presumed safety of the rules does not necessarily mean that the rules are as effective as they should be or that given recent changes in the industry they will continue to provide an adequate safety standard. There are a number of factors which affect the adequacy of the rules and require that they be amended.

Perhaps the most significant factor requiring amendment of the current rules is that the rules regulating the rest requirements under Part 121 are extremely complicated. Over the 30 years of their existence they have required thousands of pages of interpretations, have sometimes been incorrectly followed by air carriers, and have been difficult to enforce. Thus, a primary aim of this rulemaking is to clarify and simplify the rest requirements for domestic air carriers. This is consistent with Executive Order 12291.

A second significant factor requiring amendment of the rules has been their inflexibility. For example, although under the current rule air carriers are not considered in violation of the rules if flight times are exceeded due to adverse weather conditions or other circumstances beyond the control of the air carrier, an air carrier presently has not flexibility to adjust scheduled rest periods in the event of late arrivals or other factors. If a flight is late, the subsequent flights must often be held up while the flight crewmember receives his scheduled rest. This has resulted in numerous canceled flights as well as delays, and has often required crewmembers to spend extra days away from home. An important objective of this rulemaking proceeding is to eliminate this problem, without derogating safety, by allowing flexibility in scheduling rests so that air carriers, passengers, and flight crewmembers are not unnecessarily inconvenienced.

A third factor affecting the current rules is a change in the character and make-up of the air transportation industry. In the past, most of the domestic air carriers were major companies each employing several thousand crewmembers. However, under deregulation of the air transportation industry, the number and variety of part 121 domestic operators has dramatically increased. The present complexity and variety of operations require that the FAA provide clear and simple minimum safety criteria for all operators. If the present rules are examined as the criteria for safe flight time limitations and rest requirements, some potential weaknesses are apparent. For example, current Part 121 fligh time limits are effective against chronic long-term fatigue because they provide weekly, monthly, and annual flight time limits as well as daily rest requirements for a pilot who flies more than 8 hours in a 24-hour period. But these rules do not provide rest requirements for a pilot scheduled for 8 hours or less flight time in a 24-hour period. Thus, under the current rules an operator can schedule a flight crewmember for 8 hours or less of flight time in a 24-hour duty day and repeat this cycle until the flight crewmember reaches the 30-hour weekly limit. The current Part 121 rule, then, provides no protection against acute short-term fatigue for flight crewmembers scheduled for 8 hours or less of flight time in a 24-hour period. On the other hand, under Part 135, acute short-term fatigue is covered by a 10-hour minimum rest requirement in a 24-hour period and by a flight time limit of 8 hours for a one-pilot crew and 10 hours for a two-pilot crew; but not annual, monthly, or weekly limits exist to protect against long-term fatigue. Under existing Part 135 rules a flight crewmember could fly 10 hours a day with a 14-hour duty day every day of the year, all year.

A fourth factor affecting the current rules, and one related to the changing character of the air transportation industry, has been the growth of commuter-type operations. Some commuter-type operations fall under Part 121 domestic rules while others fall under Part 135 rules. A question exists as to whether either set of requirements effectively covers these comparatively new and growing operations. Thus an additional aim of this rulemaking proceeding has been to study the materials submitted by this industry group and incorporate into the rules standards which will provide a level of safety equivalent to other air transportation operations.

The current rulemaking proceeding is not the FAA's first attempt to solve these problems. For several years the FAA has recognized that the flight time limits and rest requirements need to be clarified and substantively improved in those areas where they are potentially weak. On several occasions the FAA has attempted to correct the flight time limitation problems of both Parts 121 and 135 through rulemaking actions. [1] But because of the complexity of the flight time rules and the economic interests affected, none of the past proposals succeeded in resolving the problems to the satisfaction of the affected parties. Given the importance of these rules in air transportation safety, the FAA, therefore, decided to try an innovative approach which would bring the affected parties together to negotiate a resolution. It was the FAA's hope that this approach would produce a proposal that would at once simplify and clarify the existing regulations, increase their flexibility, and meet all statutory requirements.

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[1] The following past proposals have to do with flight time limitations and rest requirements:

Notice No. 77–17 [42 FR 43490, August 29, 1977]
Notice No. 78–3 [43 FR 8070, February 27, 1978]
Notice No. 78–3B [45 FR 53316, August 11, 1980]
Notice No. 82–4 [47 FR 10746, March 11, 1982]

### Regulatory Negotiation

Regulatory negotiation, as recommended by the Office of Vice President and by the Administrative Conference of the United States, is a procedure by which representatives of all interests affected by a rulemaking fully discuss the issues under conditions conducive to narrowing or eliminating differences and to negotiating a proposed rule acceptable to each interest. In accordance with the recommended procedure, the FAA created an advisory commmittee chartered under the Federal Advisory Committee Act. The committee is comprised of persons representing the diverse interests affected by the flight time rules including persons representing flight crewmembers, air carriers, air taxis, helicopter operators, and the public. At its opening session, the committee was addressed by the FAA Deputy Administrator, the Deputy Secretary of Transportation, the Legal Counsel to the Vice President, a representative of the Office of Information and Regulatory Affairs in the Office of Management and Budget, and the Chairman of the Administrative Conference of the United States. These individuals stated their support for the committee and encouraged the committee to take its charge seriously. In addition, representatives of these offices attended and monitored sessions. The committee met under the direction of Nicholas Fidandis (former Director of Mediation Services of the Federal Mediation and Conciliation Service) who acted as convenor/mediator.

The committee met for 16 days in 1983 (June 29–30, July 11–13, July 25–27, August 8–10, August 22–25, and September 26) and thoroughly discussed the major issues involved in the regulation of flight time limits. Numerous proposals and justifications were drafted by participants and submitted to the committee for review. Copies of all proposals submitted for consideration by committee members and copies of written summaries of each meeting are available in the public docket for this NPRM. Although the committee did not reach consensus on any particular proposal, its deliberations were successful because committee members gave serious consideration to and entered onto candid discussion of the various proposals and justifications submitted to them. Thus the committee succeeded in narrowing the differences among parties and in reaching substantial agreement of some issues. In addition, the committee identified major areas of concern and all parties obtained significant, new information on a subject which has been discussed, without resolution, for years. This document is a notice of proposed rulemaking that reflects the committee's discussion of and agreements on the issues. The document sets forth the FAA's analysis of those agreements and discussions.

The Regulatory Negotiation Advisory Committee also met on February 14, 1984, to review and discuss this proposed rule and preamble. A majority of the committee members recommended that the proposed rule be published in the **Federal Register** as submitted. Several members of the committee, however, dissented from this recommendation because they believed that certain issues which have not been resolved to their satisfaction should be addressed further before the proposal is published. The FAA has decided to publish the proposed rule and preamble as submitted to the committee on February 14, but with modifications in the preamble which address the following unresolved issues:

1. The maximum flight time allowed between rests under proposed Parts 121 and 135 scheduled operations;

2. The minimum amount of rest required under proposed Parts 121 and 135 scheduled operations;

3. The maximum weekly, monthly, and annual flight time limits under proposed § 121.471(h);

4. The limitation of "passenger-carrying" in the definition of "scheduled operations" under proposed § 135.261(b); and

5. The lack of a specific response time for deviations under proposed § 135.263(f).

Modifications on these issues have been made in appropriate sections of the preamble.

Comments received on this proposed rule will be reviewed by the committee to determine whether it should recommend that the proposal be modified. Any necessary changes would be negotiated by the committee in the same manner as the NPRM. It must be emphasized that a decision on the final rule is the sole responsibility of the Administrator.

## PROPOSED REVISIONS

### General Discussion

The proposed rule modifies the current rule in several important ways. First, it reorganizes the regulations according to certain operational differences by creating a separate category in Part 121 domestic rules for commuter-type operations and in Part 135 by separating scheduled operations from non-schedule. Secondly, it adds cumulative flight time limits for all Part 135 operations. The cumulative flight time limits and daily rest requirements for commuter-type Part 121 and scheduled Part 135 operations would be identical. Thirdly, it clarifies the daily rest requirements of Part 121 operators and specific Part 135 operators and adds provisions which correct potential weaknesses in the current rule and which provided scheduling flexibility for air carriers. A complete description and rationale for specific revisions appears below.

## 49 Fed. Reg. 31523 (Aug. 7, 1984)

**[Docket No. 23634]**

### Regulatory Negotiation Advisory Committee; Meeting

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463; 5 U.S.C., App. I), notice is hereby given of the next meeting of the Regulatory Negotiation Advisory Committee for flight and duty time rulemaking to be held September 11–13, 1984, at the Quality Inn Pentagon City, 300 Army Navy Drive, Arlington, Virginia, commencing at 9:00 a.m.

The agenda for the meeting is as follows: the Committee will review comments received on Notice of Proposed Rulemaking (NPRM) 84–3, Flight Time Limitations and Rest Requirements for Flight Crewmembers (49 FR 12136; March 28, 1984), to determine whether it should recommend that the proposal be modified. Any necessary changes to the proposal would be negotiated by the Committee in the same manner as the NPRM.

The Committee should strive to resolve any remaining issues at this meeting as the Federal Aviation Administration intends to dissolve the Committee and proceed with prompt development of any rule changes as necessary based on Notice 84–3, comments received on that notice, and any additional recommendations provided by the Committee.

Attendance is open to the interested public, but limited to space available. With the approval of the Chairperson, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact Mr. William J. Sullivan, Executive Secretary, Regulatory Negotiation Advisory Committee, Office of Associate Administrator for Aviation Standards, 800 Independence Avenue, S.W., Washington, D.C. 20591, telephone 202–426–7815.

Based on the assumption that the Committee will resolve any remaining issues and recommend responses to the comments received on Notice 84–3 during the September meeting, one additional meeting would be required to review the draft final rule. Every attempt will be made to publish notice of such meeting as soon as practicable.

Issued at Washington, D.C., on August 1, 1984.

**Fred Laird,**

*Acting Executive Secretary, U.S. Regulatory Negotiation Advisory Committee.*

[FR Doc. 84–20805 Filed 8–6–84; 8:45 am]

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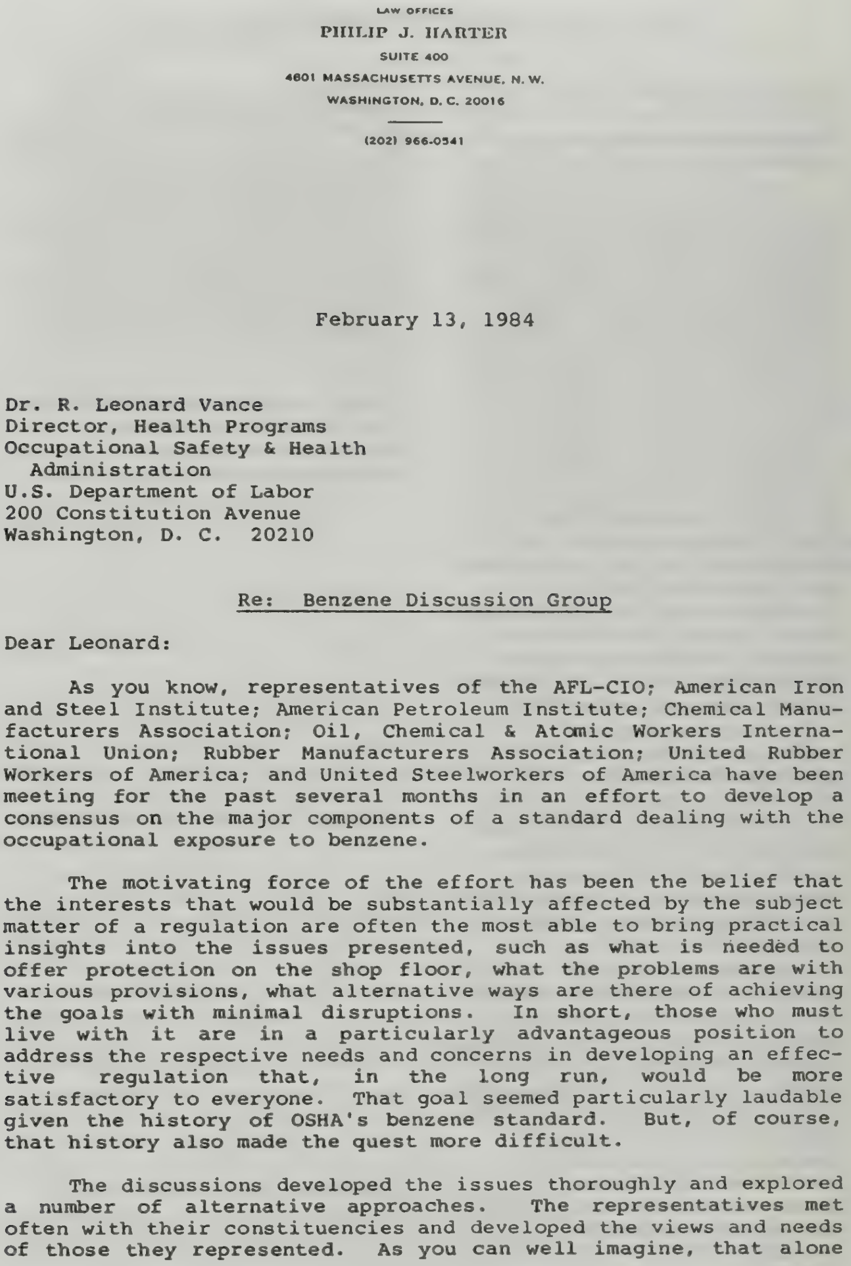

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February 13, 1984

Dr. R. Leonard Vance
Director, Health Programs
Occupational Safety & Health
Administration
U.S. Department of Labor
200 Constitution Avenue
Washington, D. C. 20210

Re: Benzene Discussion Group

Dear Leonard:

As you know, representatives of the AFL-CIO; American Iron and Steel Institute; American Petroleum Institute; Chemical Manufacturers Association; Oil, Chemical & Atomic Workers International Union; Rubber Manufacturers Association; United Rubber Workers of America; and United Steelworkers of America have been meeting for the past several months in an effort to develop a consensus on the major components of a standard dealing with the occupational exposure to benzene.

The motivating force of the effort has been the belief that the interests that would be substantially affected by the subject matter of a regulation are often the most able to bring practical insights into the issues presented, such as what is needed to offer protection on the shop floor, what the problems are with various provisions, what alternative ways are there of achieving the goals with minimal disruptions. In short, those who must live with it are in a particularly advantageous position to address the respective needs and concerns in developing an effective regulation that, in the long run, would be more satisfactory to everyone. That goal seemed particularly laudable given the history of OSHA's benzene standard. But, of course, that history also made the quest more difficult.

The discussions developed the issues thoroughly and explored a number of alternative approaches. The representatives met often with their constituencies and developed the views and needs of those they represented. As you can well imagine, that alone was an accomplishment, since there was a wide variety of viewpoints within the respective interests with respect to both the substance and the procedure of the approach. The representatives also met with their counterparts from allied interests to develop common views and positions. Discussion outlines and papers were prepared and discussed extensively. The representatives and their organizations invested an enormous amount of work in this project. Every representative and interest conducted the discussions in the utmost good faith: the individuals and interests clearly jelled into a productive group that attempted to bridge the problems that have plagued some OSHA rulemaking in the past.

The group made significant progress towards a consensus on an overall approach. Unfortunately, however, I regret to report that enough differences remain that discussions have broken down and they have therefore been adjourned. The group felt it was important to consider the standard as a whole, and hence that it would be inappropriate to recommend even pieces of it without concurrence on its broader aspects. Thus, we have nothing tangible as a result of the discussions to provide OSHA at this time.

That is not to say, however, that the effort has not been worthwhile. The group was unanimous that it has been a productive, beneficial undertaking. It aided the respective parties in sorting out the complex inter-relationship of the provisions of the standard, but even more important, it enabled the parties to understand the needs and concerns of the others. As a result, each party can better respond to the others. Further, the group got to know one another and develop a productive, working relationship based on mutual respect and integrity. We all hope that that will diminish unproductive adversarial tangles in the future so that the important issues can be dealt with directly and concretely.[1] Thus, we would hope that even if nothing further develops of the discussions, OSHA will ultimately reap considerable benefit from the process by means of a more efficient hearing on its benzene standard, and indeed during future proceedings.

Each interest is free to pursue its own devices concerning

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[1] Given the apparent misunderstanding in some quarters, I should note that we have always viewed the discussions as a form of adversarial relationship, not a hot tub of let's all be friends; its purpose is to channel the adversarial relationship into a more productive posture where the needs and concerns can be confronted directly. We hope we achieved that.

Dr. R. Leonard Vance
February 13, 1984
Page 3

OSHA's benzene standard. No one is bound by anything that was said or done during the discussions, and every participant agreed that those discussions would not be used against anyone during the hearings or other proceedings. The discussions were exploratory and tentative. No interest or person was committed by them.

We are hopeful (that is an occupational hazard of mediators) that discussions will continue ad hoc and informally, although that is by no means assured. Certainly the sense of the meeting was that "no doors are being closed."

We hope that much of the effort that went into this project will facilitate similar efforts in the future. To that end, we would appreciate any comments that you, others at OSHA, those who participated in the project, or those who did not, may have on it -- what was good, what could have been improved, and what is inherently a problem. We welcome those comments for attribution or anonymously so the process can benefit from actual experience.

We very much appreciate the opportunity to work with an outstanding group of responsible, dedicated professionals. It has been a rewarding undertaking for us.

Sincerely yours,

Philip J. Harter
Philip J. Harter

Gerald W. Cormick (pjh)
Gerald W. Cormick

cc: All Participants

**ERM-McGlennon Associates**
**Environmental Resources Management**

283 Franklin Street • Boston, Massachusetts 02110 ☎ (617) 357-4443

March 10, 1987

Lee M. Thomas, Administrator
U.S. Environmental Protection Agency
401 "M" Street, SW
Washington, D.C. 20460

Dear Mr. Thomas:

I am pleased to advise you that the RCRA Permit Modification Negotiating Committee has completed its work and herein submits its recommendations for revising the current rule governing modifications to RCRA permits. The attached Committee Statement is the result of over five months of intense negotiations among representatives of industry, state government, EPA and public interest organizations. The Statement will be used as the basis for a Proposed Rule. Committee members who signed the Statement have agreed to support the rulemaking as long as it is consistent with the Statement.

The Committee Statement represents agreement among 18 of the 19 Committee members. The Chesapeake Bay Foundation actively participated in this negotiated rulemaking project but their representative chose not to sign the Statement. It is my understanding that the Foundation disagrees with the principle of the automatic authorization of Class 2 permit modification. The Foundation intends to forward a letter clarifying their position.

Unfortunately, the final meeting of the Committee was cut short (by a bomb scare) and several points were not fully discussed. As such, individual Committee members would like to clarify or highlight the following items:

- The modification assignments contained in Attachments A and B should be part of the Proposed Rule.
- Several Class 1 modifications require prior approval of the Agency Director. Most of the Committee members felt that the last two unclassified modifications (see page 12, Attachment A) should be assigned to Class 1 with prior approval of the Director.
- Two distinct types of temporary authorizations (TA's) were developed. One temporary authorization would be based upon a TA request, while the other could be issued after a permit modification request is submitted.

An affiliate of the Environmental Resources Management Group with offices in
Annapolis, MD • Bloomington, MN • Boston, MA • Brentwood, TN • Charleston, WV • Columbus, OH • East Lansing, MI • Houston, TX
Marietta, GA • McLean, VA • Metairie, LA • Miami, FL • Palatine, IL • Plainview, NY • Tampa, FL • Walnut Creek, CA • West Chester, PA

- Some Committee members felt that TA's should be allowed for less than 90 days.
- With respect to the submission of a TA request, the permittee must submit sufficient information to the agency to ensure compliance, to the extent practicable, with Part 264 requirements. Where this is not practicable, the applicant must comply with Part 265 requirements.
- When referring to a change of more or less than 25% of capacity, this would be the initially permitted capacity.

In addition to the proposed rulemaking, the Committee recommends that EPA establish an informal working group to address the need for and feasibility of allocating funds for local technical review of specific permit modification requests and for public education on hazardous waste issues. The following organizations should be considered in selecting members of this new working group:

- The Legal Environmental Assistance Foundation
- The Hazardous Waste Treatment Council
- The National Solid Waste Management Association
- The American Coke and Coal Chemical Institute
- The Chemical Manufacturers Association.

The members of the Committee appreciate the opportunity to work with EPA on the development of the proposed rule. Finally, the Committee recognizes that it may be useful to reconvene an informal meeting of the Committee to assist you in reviewing a draft rule or reviewing comments on the proposed rule.

Sincerely,

John A.S. McGlennon
Committee Facilitator

JM/cs

cc: Marcia Williams
Chris Kirtz
Members of the Committee

# FINAL
# NEGOTIATING COMMITTEE STATEMENT
# ON
# PERMIT MODIFICATION RULEMAKING

February 24, 1987

In July 1986, the U.S. Environmental Protection Agency (EPA) announced in the Federal Register the establishment of the Permit Modification Negotiating Committee. The Committee was charged with negotiating issues leading to a Notice of Proposed Rulemaking which would amend current regulations governing major and minor modification to RCRA permits. The Committee consists of representatives from industry, state government, EPA and environmental/citizen groups. A complete list of the Committee members is presented at the end of this Statement.

The Permit Modification Negotiating Committee held its first formal meeting in Washington, D.C. on September 10, 1986. Committee protocols were adopted and several Working Groups were formed to examine key issues. The full Committee and the Working Groups met throughout October, November and December, 1986 and January and February, 1987.

At the conclusion of the December Committee meeting, a Working Group consisting of seven Committee members was asked to prepare material for the January 13th meeting. In response to that request, a preliminary Statement was first prepared by the facilitators based primarily on the minutes of earlier meetings and related written materials. The preliminary Statement was distributed to the Working Group and discussed in a conference call held on January 9, 1987. A Draft Statement was then prepared incorporating the comments and suggestions made during the conference call. The Draft Statement was discussed and revised by the full Committee at the January 13th and 14th meeting and the February 23rd and 24th meeting. This document represents the Final Committee Statement.

## OVERALL APPROACH

After considering a number of alternative approaches, the Committee has agreed upon a process that recognizes different types or classes of modifications. The review process would allow for an expedited approval if there was no public concern over the proposed change.

There will be three classes of modifications. Class 1 will cover routine changes such as typographical errors or new telephone numbers. Class 1 changes would generally be allowed without prior agency approval. The Class 2 and 3 modification processes both begin with public notice of a modification request and an early public comment period. If there is public interest, an informational meeting is held. In Class 2, the agency makes a

-3-

decision after the informational meeting (if any). In Class 3, the agency gives notice of its intent to decide and anyone can request a public hearing.

* * *

-18-

The U.S. Environment Protection Agency commits to publishing a Notice of Proposed Rulemaking based on this Statement. Each organization whose name and authorized signature appears below agrees to support the Proposed Rulemaking.

Johan Bayer
Chemical Waste Management, Inc.
Date 3/3/87

John Campion
Pharmaceutical Manufacturers Association
Date 2/24/87

Lecil Colburn
American Coke and Coal Chemical Institute
Date 2/24/87

Frank Coolick
New Jersey Bureau of Hazardous Waste Engineering
Date 2/24/87

Gary Dietrich
ICF Corporation/ENSCO Inc.
2/24/87
Date

Larry Eastep
Illinois Environmental Protection Agency
2/24/87
Date

Bonnie Exner
Citizen Intelligence Network
2-24-87
Date

Richard Fortuna
Hazardous Waste Treatment Council
Feb 24, 1987
Date

Arthur Gillen
BASF Corporation
Synthetic Organic Chemical Manufacturers Association
24 Feb 87
Date

Khristine Hall
Khris Hall
IBM Corporation
2/24/87
Date

Wm F. Hamner
William Hamner
North Carolina Division of Health Services
2/24/87
Date

Minor Hibbs
Minor Hibbs
Texas Water Commission
2/24/87
Date

Gretchen Monti 3/3/87
Gretchen Monti Date
League of Women Voters

Philip Palmer 2/29/87
Philip Palmer Date
Dupont Corporation
Chemical Manufacturers Association

Suellen Pirages 2-24-87
Suellen Pirages Date
National Solid Waste Management Association

Ann Powers Date
Chesapeake Bay Foundation

Suzi Ruhl 3/3/87
Suzi Ruhl Date
Legal Environmental Assistance Foundation

for 2/24/87
Marcia Williams Date
U.S. Environmental Protection Agency

Eleanor W Winsor 2/26/87
Eleanor Winsor Date
Pennsylvania Environmental Council

# CHAPTER 8 - RESOURCES AND LOGISTICS

Conducting a regulatory negotiation can require resources not usually involved in development of regulations. These include services of facilitators and convenors, research conducted on behalf of the negotiating committee, administrative support for the committee, expenses of participation for some of the negotiators, and training costs. This chapter addresses the need for these resources, options for providing the resources, and mechanisms used by federal agencies for obtaining access to them. See chapter 11 for a list of some individuals and organizations offering mediation and other relevant services.

Overall costs of a reg-neg proceeding are difficult to pinpoint, but have been estimated to range from about $25,000 to $200,000, depending primarily on the cost of services required for convening and facilitation. Factors affecting the cost include whether such services are obtained through contracts with non-governmental providers, the complexity of the issues, and the degree of controversy. The lower end of the range would be realistic only when using convenors and facilitators employed by the agency or department conducting the reg-neg, or when the negotiations are not very complicated. Much higher costs would be entailed when using more than one outside neutral and extensive support services, and when the negotiations require an extensive schedule of meetings.

## Convenor and Facilitator Services

The Reg-Neg Act assumes that a facilitator will be used for negotiated rulemaking and specifies a number of duties for that person, including chairing meetings and keeping records, as well as assisting the committee members in the negotiations. (5 U.S.C. §566) The Act also provides for use of a convenor, but does not require one. (5 U.S.C. §563(b))

All of the regulatory negotiations to date have employed the services of a neutral third party to facilitate negotiation sessions, and many have used neutral third parties as convenors. In some reg-negs the same person served as both convenor and facilitator or mediator, while in others different individuals performed these functions. Convenors and facilitators have come from several sources: from other offices within the agency, from other federal agencies such as the Federal Mediation and Conciliation Service, and from the private sector.

The Administrative Conference has created a roster containing information on mediators, facilitators, and other neutrals who are available to assist in negotiated rulemaking and other cases involving federal agencies. Persons interested in locating neutrals may request that the Conference provide a list of candidates. For further information about the roster, contact the Manager of Roster Services at the Administrative Conference, (202) 254-7020.

### *Federal Agency Sources*

Services of federal employees from agencies other than the one developing a negotiated rule can be arranged through an informal loan, a temporary detail, or an interagency agreement, depending on the commitment of time and resources required.

The Federal Mediation and Conciliation Service has provided convenors and facilitators for several agencies including EPA and the Departments of Education, Agriculture, Housing and Urban Development, Transportation, and the Interior. The FMCS budget does not provide specific funding for negotiated rulemaking, but the agency considers individual requests for FMCS mediators, on a reimbursable basis, depending on its available personnel and the specific requirements of the negotiation. Inquiries of this nature should be directed to John Wagner, Director of Alternative Dispute Resolution Services, FMCS (202) 606-5445. FMCS will also consider providing training, and can be a source of information about mediators in areas of the country outside of Washington, D.C.

The Community Relations Service of the Department of Justice can provide conciliators in disputes that involve racial, national origin, ethnic or cultural issues. CRS has not been called upon to mediate any of the regulatory negotiations to date. For information about the availability of CRS neutrals, contact the Director at (301) 492-5929.

Occasionally, experienced convenors or facilitators can be borrowed from other federal agencies that have conducted regulatory negotiations. The table in chapter 10 lists persons who have functioned in these roles in many of the reg-negs to date.

### Private Sector Services

A number of options exist for obtaining the services of private sector mediators, facilitators, or consultants. These include full competitive procurement, small purchases, indefinite quantity contracts, basic ordering agreements, supply schedules, and hiring as consultants, experts or special government employees.

A report for the Administrative Conference by George D. Ruttinger, "Acquiring the Services of Neutrals for Alternative Means of Dispute Resolution and Negotiated Rulemaking," discusses a variety of issues arising in connection with obtaining the services of a neutral third party. Based on this report, the Conference recommended procedures for acquiring such services (Recommendation 86-8, 1 CFR §305.86-8). Both the recommendation and the report appear as appendices to this chapter. See especially section III.D for a discussion of the advantages and limitations of different options for contracting with neutrals. Readers should note, however, that the portions of those materials addressing specific mechanisms have in some respects been superseded by provisions of the Federal Acquisition Streamlining Act of 1994. (See Public Law No. 103-355, §§1005, 1055.) In particular, the relevant part of that Act was intended to facilitate the hiring of private sector professionals as neutrals by (i) raising the threshold for agency use of simplified small purchase procedures from $25,000 to as high as $100,000; and (ii) providing that agencies need not use full competitive procedures for obtaining expert services in litigation or other disputes, including neutrals' services.

The complexity and length of time of a negotiation will affect the total cost for a facilitator or convenor. If the costs exceed those allowed for a small purchase order, agency rulemaking offices should consult with the Head of Contracting Activity (HCA) at their agency to determine whether the agency has current contracts in place for obtaining these services or has had experience with them. The HCA can also check with HCAs of other federal agencies to discover whether another agency has an appropriate contract or grant mechanism available to acquire mediation services that could be accessed through an interagency transfer of funds.

Agencies with significant continuing involvement in regulatory negotiations may wish to set up a long-term contract mechanism to provide ready access to private sector neutrals. Such contracts can take months to put into place, frequently longer than is timely for beginning a given negotiation. However, they can be structured so that, once put into place, the same contract may be used whenever needed for future negotiations. (See the appendix for examples of contract documents.)

## Committee-Sponsored Research

During its deliberations, a negotiating committee may require the services of technical consultants to advise it, or may require the generation of additional information not currently available to the parties at the table. These needs raise two issues: the source of funds to pay for the services and the mechanism by which to disburse the money.

The agency itself may have funds available to support the rulemaking. Alternatively, committee members or other private parties concerned with the rule may be able to contribute funds. At its initial meeting the negotiation committee may want to adopt procedures governing the types of projects and activities that these resources would be used for and the procedures for approving these projects and activities. Such funds have been used by negotiating committees to hire statisticians, computer modelers, and scientists who provided information and evaluations for use by committee members.

Management of the funds may be through an existing agency technical contract, through a contract with (or a grant to) a neutral escrow organization such as the American Arbitration Association or the National Institute for Dispute Resolution, or through a small purchase directly with the provider of the service.

## Expenses for Training, Orientation and Meetings

Because pre-negotiation training sessions usually take no more than one day, the costs should be less than the ceiling on small purchase orders. Agency training offices may have access to skilled negotiation trainers through contracts, basic ordering agreements or supply schedules.

Rental of conference rooms may be necessary if an agency or local participants do not have rooms suitable or available for the negotiations. Small purchase orders are generally the easiest mechanism for paying for conference rooms, unless the agency has a contract mechanism in place to provide such services. Agencies have usually borne this cost burden for their committee. The agency and the committee should consider whether lunches and snacks will be served at the meeting site. Eating on the premises may save valuable time and it is reasonable to ask committee members to pay for food service.

## Expenses of Participation by Nongovernment Committee Members

While most industrial and business parties can attend negotiating sessions on their own budgets, public interest group participants, union representatives, and some state or local government officials may not have access to organizational funds to pay travel expenses, especially if there are multiple meetings held in an expensive city. It may be essential to find funding support if such parties are necessary to form a balanced negotiating committee. This is one of the most difficult issues that an agency may have to resolve when undertaking negotiated rulemaking.

The Reg-Neg Act provides that an agency may, in accordance with §7(d) of the Federal Advisory Committee Act (see appendix to chapter 3), pay for a committee member's reasonable expenses, provided the member certifies a lack of sufficient financial resources to participate and the agency determines that the member's participation is necessary to assure adequate representation of a particular interest. (5 U.S.C. §568(c))

Agencies should consider whether it is possible to hold meetings in the city where a needy party is located. Computer, telephone, or video conferences may also be options for some meetings. However, these choices at best may not offer the opportunity for human interaction that successful negotiations often require.

An agency may be able to locate agency funds that can be used for travel of an invited participant. In practice, however, most agencies have very tight travel budgets and cannot provide routine access to these budgets for external parties.

Sometimes, when pressed, an apparently needy public interest organization has been able to find a way to pay its own costs of participation or to obtain grants to fund its travel. EPA has found that problems arise when the same organization is asked to participate in a second, third or fourth negotiated rulemaking, for by this time the resources of the organization may become severely strained.

The convenor, the facilitator, or a committee member can approach charitable organizations for contributions to a resource pool for participants' expenses. Such applications can be very time consuming. Moreover, because most granting organizations make awards only at fixed times during the year, this source of funding may not be timely for a given negotiation. The selection of organizations to be approached should be considered carefully in order to minimize the reluctance of some organizations to accept funds from sources that appear not to be neutral.

Sometimes, members of the negotiation committee can be approached with regard to their willingness to assist other parties. This too raises several sensitivities. First, it is important that the wealthier parties not feel "blackmailed" into contributing, nor should they feel they can buy the cooperation of the needy parties. Second, if funds are raised, a neutral escrow mechanism must be designed so that the needy parties do not feel that they are compromised by accepting the funds or that they are perceived as accepting "tainted" money. This method may be a last resort because of these sensitivities.

## Reimbursement for Time of Nongovernment Participants

A number of public interest groups have pressed, both in individual negotiated rulemakings and before Congress, to be compensated for time spent in preparation and negotiations. However, agencies have not been willing to provide this compensation. The public interest groups' arguments are that if a regulation is promulgated and they file suit and win, then they are entitled to request the court to order payment of reasonable fees for compensation of staff and attorneys. Since a successful negotiated rulemaking effort may obviate this litigation, they maintain that they should be entitled to the same access to compensation from the agencies. Moreover, by cooperating in the drafting of a proposed rule, they may claim to have been performing a function that would normally be performed by agency staff.

## Appendix

The appendix contains a table prepared by EPA in 1987, showing that agency's contract and direct costs for its first seven reg-negs. The figures do not include staff time or other resources that would ordinarily be spent on normal rulemaking activities. The column headed "overall total" shows the sum of "third party neutral support" and "resource pool support." The last two columns show the division of these expenses between the Office of Policy, Planning and Evaluation and the respective program offices. The cost of reg-negs, however, has increased substantially since that time. (See introductory section of this chapter.)

Administrative Conference Recommendation 86-8 and the background report by George D. Ruttinger discuss various mechanisms that are available to acquire the services of convenors, facilitators, or other neutrals. (But see explanation above of subsequent statutory changes.)

Also included are sample procurement notices from the Commerce Business Daily and sample contract documents from EPA and the Department of the Interior. The contract documents are included as illustrative examples. They may not necessarily be suitable as models to be applied by other agencies where the circumstances and requirements may differ.

COSTS OF REGULATORY NEGOTIATIONS TO DATE

| NEGOTIATION | THIRD PARTY NEUTRAL SUPPORT | | | RESOURCE POOL SUPPORT | | | OVERALL TOTAL | OPPE | PROGRAM OFFICE |
|---|---|---|---|---|---|---|---|---|---|
| | CONVENING | FACILITATION | ANALYSIS | TRAVEL & PER DIEM | CONSULTANTS | TOTAL | | | |
| ASBESTOS | $8,000.00 | $36,200.00 | | $16,139.00 | $9,112.00 | $25,251.00 | $69,451.00 | $9,451.00 | $60,000.00 |
| UIC | $22,232.00 | $69,558.00 | | $35,903.00 | $4,457.00 | $40,360.00 | $132,150.00 | $82,150.00 | $50,000.00 |
| RCRA | $22,765.00 | $56,908.00 | | $8,895.00 | | $8,895.00 | $88,568.00 | $65,568.00 | $23,000.00 |
| WBS | $5,970.00 | $21,792.00 | $6,500.00 | $20,763.00 | $5,946.00 | $26,709.00 | $60,971.00 | $60,971.00 | |
| FWP | $30,000.00 | $34,605.00 | | $43,407.00 | $5,899.00 | $49,306.00 | $113,911.00 | $103,911.00 | $10,000.00 |
| SEC. 18 | $23,500.00 | $37,500.00 | $5,000.00 | $25,306.00 | | $25,306.00 | $91,306.00 | $91,306.00 | |
| NCP | $18,500.00 | $47,000.00 | $5,000.00 | $20,048.00 | $12,500.00 | $32,548.00 | $103,048.00 | $103,048.00 | |
| AVERAGE | $18,709.57 | $43,366.14 | $2,357.14 | $24,351.57 | $5,416.29 | $29,767.86 | $94,200.71 | $73,772.14 | $20,428.57 |

# Recommendation 86-8, 1 CFR §305.86-8

## § 305.86-8 Acquiring the Services of "Neutrals" for Alternative Means of Dispute Resolution (Recommendation No. 86-8).

The Administrative Conference has repeatedly encouraged agencies to take advantage of mediation, negotiation, minitrials, binding arbitration and other alternative means of dispute resolution ("ADR").[1] While some agencies have begun to employ these methods to reduce transaction costs and reach better results, many disputes are still being resolved with unnecessary formality, contentiousness and delay. This Recommendation is aimed at helping agencies begin to explore specific avenues to expand their use of ADR services.

A key figure in the effective working of various modes of ADR, including negotiated rulemaking, is the "neutral"—a person, usually serving at the will of the parties, who generally presides and seeks to help the parties reach a resolution of their dispute. These neutrals, often highly skilled professionals with considerable training in techniques of dispute resolution, can be crucial to using ADR methods with success.[2] For agencies to use ADR effectively, they should take steps to develop routines for deciding when and how these persons can be employed, to identify qualified neutrals, and to acquire their services.

The diversity of roles played by neutrals and the uncertainty as to certain applicable legal requirements present complications for agencies considering uses of ADR. Neutrals may be specially trained and accredited, or may simply hold themselves out as having certain expertise, experience or credibility. They may be called on to make binding decisions, consistent with applicable statutory and regulatory requirements, when opposing positions cannot be reconciled, or they may simply render advice to the parties. Time may be of the essence in acquiring their services, as in many arbitrations, but in some instances may be a minor consideration. Costs of using outside neutrals may range from a few thousand dollars (for the services of a minitrial advisor) to six figures (for convening and facilitating a large-scale negotiated rulemaking). These differences render specific advice difficult to give in advance. Agencies, Congress, courts, and others who employ ADR methods or review their use should nonetheless observe certain guidelines intended to accomplish the following goals:

- *Supply.* Broadening the base of qualified, acceptable individuals or organizations, inside and outside the government, to provide ADR services.
- *Qualifications.* Insuring that neutrals have adequate skills, technical expertise, experience or other competence necessary to promote settlement, while avoiding being too exclusive in the selection process.
- *Acquisition.* Identifying existing methods, or developing new techniques, for expeditiously acquiring the services of neutrals at a reasonable cost and in a manner which (a) insures a full and open opportunity to compete and (b) enables agencies to select the most qualified person to serve as a neutral, given that the protracted nature of the government procurement process is often inconsistent with the goals of ADR and the need to avoid delays.[3]
- *Authority.* Minimizing any uncertainty under the "delegation" doctrine or similar theories that may adversely affect the authority of some neutrals to render a binding

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[1] In Recommendation 86-3, the Conference called on agencies, where not inconsistent with statutory authority, to adopt alternatives to litigation and trial-type hearings such as mediation, minitrials, arbitration and other "ADR" methods. *Agencies' Use of Alternative Means of Dispute Resolution,* 1 CFR 305.86-3. In the rulemaking sphere, Recommendations 82-4 and 85-5 have been instrumental in promoting agency experimentation with negotiated rulemaking, which involves convening potentially interested parties to negotiate the details of a proposed rule. *Procedures for Negotiating Proposed Regulations,* 1 CFR §§ 305.82-4 and .85-5. *See also, Negotiated Cleanup of Hazardous Waste Sites Under CERCLA,* 1 CFR 305.84-4; *Resolving Disputes Under Federal Grant Programs,* 1 CFR 305.82-2; and *Case Management as a Tool for Improving Agency Adjudication,* 1 CFR 305.86-7.

[2] *See* the Glossary in the Appendix for brief descriptions of the roles of neutrals in various proceedings.

[3] While there may be situations in which agencies can obtain the services of a qualified outside neutral without following formal procurement procedures, acquisitions of neutrals' services are generally governed by the Competition in Contracting Act, Pub. L. No. 98-369, Title VII, 98 Stat. 1175, which mandates full and open competition for contracts to supply goods and services to the Federal government, and the Federal Acquisition Regulations, 48 CFR Chapter 1, Parts 1-53, which sets forth detailed procedures for conducting competitive procurements.

decision. This consideration, however, should not prove troublesome where neutrals merely aid the parties in reaching agreement (as in nearly all mediations, minitrials and negotiated rulemakings).

These proposals are intended to help agencies meet the challenge of reaching these goals in a time of reduced resources and in a milieu in which many affected interests may oppose change.

### Recommendation

#### *A. Availability and Qualifications of Neutrals*

1. Agencies and reviewing bodies should pursue policies that will lead to an expanded, diverse supply of available neutrals, recognizing that the skills required to perform the services of a dispute resolution neutral will vary greatly depending on the nature and complexity of the issues, the ADR method employed, and the importance of the dispute. Agencies should avoid unduly limiting the pool of acceptable individuals though the use of overly restrictive qualification requirements, particularly once agencies have begun to make more regular use of ADR methods. While skill or experience in the process of resolving disputes, such as that possessed by mediators and arbitrators, is usually an important criterion in the selection of neutrals, and knowledge of the applicable statutory and regulatory schemes may at times be important, other specific qualifications should be required only when necessary for resolution of the dispute. For example:

(a) Agencies should not necessarily disqualify persons who have mediation, arbitration or judicial experience but no specific experience in the particular ADR process being pursued.

(b) While agencies should be careful not to select neutrals who have a personal or financial interest in the outcome, insisting upon "absolute neutrality"—*e.g.,* no prior affiliation with either the agency or the private industry involved—may unduly restrict the pool of available neutrals, particularly where the neutral neither renders a decision nor gives formal advice as to the outcome.

(c) Agencies should insist upon technical expertise in the substantive issues underlying the dispute or negotiated rulemaking only when the technical issues are so complex that the neutral could not effectively understand and communicate the parties' positions without it.

2. Agencies should take adavantage of opportunities to make use of government personnel as neutrals in resolving disputes. These persons may include agency officials not otherwise involved in the dispute or employees from other agencies with appropriate skills, administrative law judges, members of boards of contract appeals, and other responsible officials. The Administrative Conference, Federal Mediation and Conciliation Service ("FMCS"), the Department of Justice (particularly the Community Relations Service ("CRS")) and other interested agencies should work to encourage imaginative efforts at sharing the services of Federal "neutrals," to remove obstacles to such sharing, and to increase parties' confidence in the selection process.

3. Congress should consider providing FMCS, CRS and other appropriate agencies with funding to train their own and other agencies' personnel in the particular skills needed to serve in minitrials, negotiated rulemakings, and other ADR proceedings.

4. The Administrative Conference, in consultation with FMCS, should assist other agencies in identifying neutrals and acquiring their services and in establishing rosters of neutral advisors, arbitrators, convenors, facilitators, mediators and other experts on which Federal agencies could draw when they wished. The rosters should be based, insofar as possible, on full disclosure of relevant criteria (education, experience, skills, possible bias, and the like) rather than on strict requirements of actual ADR experience or professional certification. Agencies should also consider using rosters of private groups (*e.g.,* the American Arbitration Association). The Conference, FMCS or another information center should routinely compile data identifying disputes or rulemakings in which neutrals have participated so that agencies and parties in future proceedings can be directed to sources of information pertinent to their selection of neutrals.

5. Agencies should take advantage of opportunities to expose their employees to ADR proceedings for training purposes, and otherwise encourage their employees to acquire ADR skills. Employees trained in ADR should be listed on the rosters described above, and their services made available to other agencies.

### *B. Acquiring Outside Neutrals' Services*

1. In situations where it is necessary or desirable to acquire dispute resolution services from outside the government, agencies should explore the following methods:

(a) When authorized to employ consultants or experts on a temporary basis (e.g., 5 U.S.C. § 3109), agencies should consider utilizing that authorization in furtherance of their ADR or negotiated rulemaking endeavors.

(b) Agencies contemplating ADR or negotiated rulemaking projects involving private neutrals should, as part of their acquisition planning process pursuant to the Federal Acquisition Regulation ("FAR") Part 7,[4] periodically give notice in the *Commerce Business Daily* and in professional publications of their needs and intentions,[5] so as to allow interested organizations and individual ADR neutrals to inform the agency of their interest and qualifications.

(c) Where speed is important and the amount of the contract is expected to be less than $25,000, agencies should use the streamlined small purchase procedures of Subpart 13.1 of the Federal Acquisition Regulation[6] in acquiring the services of outside neutrals, particularly minitrial neutral advisors, mediators and arbitrators.

(d) Agencies that foresee the need to hire private neutrals for numerous proceedings should consider the use of indefinite quantity contracts as vehicles for identifying and competitively acquiring the services of interested and qualified neutrals who can then be engaged on an expedited basis as the need arises. Agencies should, where possible, seek contracts with more than one supplier. In fashioning such indefinite quantity contracts, agencies should take care to comply with the following:

(1) Agency contracts should specify a minimum quantity, which could be a non-nominal dollar amount rather than a minimum quantity of services.[7]

(2) Negotiation of individual orders under the contract is desirable, but should generally adhere to the personnel, statements of work, and cost rates or ceilings set forth in the basic indefinite quantity contract, so as to minimize "sole source" issues.

(e) Agencies should also consider:

(1) Entering into joint projects for acquiring neutrals' services by using other agencies' contractual vehicles.

(2) Using other contracting techniques, such as basic ordering agreements and schedule contracts, where appropriate to meet their needs for neutrals' services.

(3) Proposing a deviation from the FAR or amending their FAR supplements, where appropriate.

(f) Agencies should evaluate contract proposals for ADR neutrals' services on the qualifications of the offeror, but cost alone should not be the controlling factor.[8]

2. The Civilian Agency Acquisition Council and Defense Acquisition Regulatory Council should be receptive to agency or Administrative Conference proposals for deviations from,[9] or amendments to, the FAR to adapt procurement procedures to the unique re-

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[4] 48 CFR Part 7.

[5] Agencies are required to give *Commerce Business Daily* notice for all contract solicitations in which the government's share is likely to exceed $10,000. 15 U.S.C. 637(e); 48 CFR 5.201(a). For procurements between $10,000 and $25,000 in which the agency reasonably expects to receive at least two offers, no such notice is required. Pub. L. No. 99-591, October 18, 1986, Title IX, Section 922.

[6] 48 CFR Subpart 13.1. This Subpart allows agencies to make purchases in amounts less than $25,000 without following all of the formalities prescribed in the FAR for ordinary procurements. If the procurement is for less than $10,000, the agency need not advertise it in advance in the *Commerce Business Daily.* 48 CFR 5.201(a). None of these provisions relieves the agency of its mandate to obtain competition.

[7] 48 CFR 16.504(a)(2).

[8] 48 CFR 15.605(c).

[9] 48 CFR 1.402.

quirements of ADR processes, consistent with statutory mandates.

3. In the absence of appropriate considerations suggesting a different allocation of costs, in minitrials and arbitration the parties customarily should share equally in the costs of the neutrals' services.

### GLOSSARY

*Mediator.* A mediator is a neutral third party who attempts to assist parties in negotiating the substance of a settlement. A mediator has no authority to make any decisions that are binding on either party.

*Convenor/Facilitator.* Negotiated rulemakings generally proceed in two phases, one using a "convenor" and the other a "facilitator." In the first (convening) phase, a neutral called a convenor studies the regulatory issues, attempts to identify the potentially affected interests, and then advises the agency concerning the feasibility of convening representatives of these interests to negotiate a proposed rule. If the agency decides to go forward with negotiating sessions, the convenor assists in bringing the parties together. In the second (negotiating) phase, a neutral called a facilitator manages the meetings and coordinates discussions among the parties. When the parties request, a facilitator may act as a mediator, assisting the negotiators to reach consensus on the substance of a proposed rule. The roles of convenor and facilitator sometimes overlap, and often both functions are performed by the same person or persons. Neither a convenor nor a facilitator has authority to make decisions that are binding on the agency or on the participating outside parties.

*Neutral Advisor.* A minitrial is a structured settlement process in which each party to a dispute presents a highly abbreviated summary of its case before senior officials of each party authorized to settle the case. In this recommendation, it is presumed that the government is one party to the dispute. In some (but not all) minitrials, a neutral advisor participates by hearing the presentations of the parties and, optionally, providing further assistance in any subsequent attempt to reach a settlement. Typically, a neutral advisor is an individual selected by the parties. Duties of a neutral advisor may include presiding at the presentation, questioning witnesses, mediating settlement negotiations, and rendering an advisory opinion to the parties. In no event does a neutral advisor render a decision that is binding on any party to a minitrial.

*Arbitrator.* An arbitrator is a neutral third party who issues a decision on the issues in dispute after receiving evidence and hearing argument from the parties. Arbitration is a less formal alternative to adjudication or litigation, and an arbitrator's decision may or may not be binding. Arbitration may be chosen voluntarily by the parties, or it may be required by contract or statute as the exclusive dispute resolution mechanism.

[51 FR 46990, Dec. 30, 1986]

BACKGROUND REPORT FOR RECOMMENDATION 86-8

# ACQUIRING THE SERVICES OF NEUTRALS FOR ALTERNATIVE MEANS OF DISPUTE RESOLUTION AND NEGOTIATED RULEMAKING

George D. Ruttinger
Crowell & Moring
Washington, DC

Report to the Administrative Conference of the United States
November 19, 1986

CITE AS 1986 ACUS 863

## TABLE OF CONTENTS

I. INTRODUCTION
II. ESTABLISHING QUALIFICATIONS
  A. Potential Criteria
  B. Agency Experience
    1. Minitrials
      a. Corps of Engineers
      b. Department of Justice
      c. Department of the Navy
      d. Department of Energy
    2. Negotiated Rulemakings
      a. Department of Interior
      b. Council on Environmental Quality
    3. Summary
  C. Qualifications Required by Government Dispute Resolution Agencies
    1. Federal Mediation and Conciliation Services
    2. Community Relations Service
  D. Rosters Maintained by Private Organizations
    1. American Arbitration Association ("AAA")
    2. Center for Public Resources ("CPR")
  E. Conclusion
III. PROCUREMENT ISSUES
  A. The Federal Acquisition System
  B. Issues in Contracting for Neutrals' Services
  C. Case Studies
    1. Corps of Engineers Minitrials
    2. Department of Interior OCS Negotiated Rulemaking
    3. CEQ Procurement of Regulatory Negotiating Services
      a. Historical Background
      b. The CEQ Procurement
      c. The Request for Proposals
    4. Use of Government "Neutrals"
  D. Evaluation of Techniques
    1. Full Competitive Procurement
    2. Small Purchases
    3. Indefinite Quantity Contracts
    4. Other Potential Acquisition Techniques
      a. Basic Ordering Agreements
      b. Blanket Purchasing Agreements
      c. Supply Schedules
      d. Hiring Neutrals as Consultants, Experts, or Special Government Employees
      e. Innovations in Procedures
    5. Use of Government Neutrals
  E. Long-Term Structural Issues
IV. DELEGATION ISSUES
V. CONCLUSION

# ACQUIRING THE SERVICES OF NEUTRALS FOR ALTERNATIVE MEANS OF DISPUTE RESOLUTION AND NEGOTIATED RULEMAKING

GEORGE D. RUTTINGER*

## I.

## INTRODUCTION

Efficient resolution of disputes involving federal agencies is often impeded by the formalities of the adjudication or the litigation process. In recent years, private parties and the federal government have been searching for ways to streamline the litigation process by developing alternative means for dispute resolution.[1] To this end, the Administrative Conference of the United States ("ACUS") has recommended that administrative agencies, where not inconsistent with statutory authority, adopt alternatives to litigation such as arbitration, mediation, and minitrials.[2] The various techniques for resolving disputes without resort to full litigation or adjudication are referred to as Alternatives Means of Disputes Resolution, or ADR.

In the sphere of administrative rulemaking, similar trends have developed. In recent years, several agencies have experimented with a technique referred to as negotiated rulemaking, which involves convening potentially interested parties to negotiate the details of a proposed rule before it is published for notice and comment in accordance with the Administrative Procedure Act.[3] ACUS has been instrumental in promoting such experimentation through its Recommendations 82-4 and 85-5, both of which are entitled "Procedures for Negotiating Proposed Regulations."[4]

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[1] See, e.g., Harter, Points On A Continuum: Dispute Resolution Procedures and the Administrative Process, Report to the Administrative Conference of the United States (June 5, 1986).

[2] ACUS Recommendation 86-3, "Agencies' Use of Alternative Means of Dispute Resolution", 1 C.F.R. § 305.86-3.

[3] See, Harter, Negotiating Regulations: A Cure for Malaise, 71 Geo. L.J. 1 (1982).

[4] 1 C.F.R. §§ 305.82-4 and 85-5. See also, ACUS Recommendation 84-4, "Negotiated Cleanup of Hazardous Waste Sites Under CERCLA," 1 C.F.R. § 305.84-4.

A key figure in the effective working of ADR and negotiated rulemaking is the "neutral" who generally presides at the proceedings and attempts to assist the parties in reaching a negotiated resolution or, in the case of arbitration, issues a decision on the matter in dispute. The various types of ADR neutrals may be summarized as follows:

Minitrial Neutral Advisors. "A minitrial is a structured settlement process in which each side presents a highly abbreviated summary of its case before senior officials of each party authorized to settle the case."[5] In some (but not all) minitrials, a "neutral advisor" participates in the minitrial and subsequent efforts to settle the dispute. Typically, the neutral advisor is a private individual who is selected by the parties in dispute, namely the government agency and the private party or parties engaged in litigation or adjudication with the government. The role of the neutral advisor varies, but his duties may include presiding at the hearing, questioning witnesses, acting as a mediator during negotiations between the representatives of the litigants, and rendering an advisory opinion to the parties. In no event does the neutral advisor render a decision that is binding on either party to the minitrial.

Mediators. A mediator is simply a neutral third party who attempts to assist parties in negotiating an agreement. A mediator has no authority to make any decisions that are binding on either party.

Arbitrators. Arbitration is another form of litigation or adjudication, without some of the formal trappings. An arbitrator is a neutral third party who issues a decision on the arbitration issues after receiving evidence and hearing arguments from the parties. The arbitrator's decision may or may not be binding. Arbitration may be voluntary, in which the parties agree to resolve the issues in dispute through arbitration, or it may be mandatory, in which a statute or contract specifies arbitration as the exclusive means for resolving disputes.

Convenors-Facilitators for Negotiated Rulemakings. Negotiated rulemakings generally proceed in two phases. In the first phase, a "convenor" studies the issues presented by the proposed regulation, attempts to identify the interested parties, and then advises the agency regarding the feasibility of convening the interested parties in an attempt to negotiate a proposed regulation. If the agency decides to go forward with negotiated rulemaking, the facilitator then meets with the interested parties and attempts to mediate their differences and develop a proposed rule. Under the concept put forward by the ACUS recommendations, the proposed rule developed through this process is then published for notice and comment pursuant to Section 553 of the Administrative Procedure Act. The convenor and facilitator may be, and often is, the same person or persons. The convenor/facilitator has no authority to make any decisions that are binding on the interested parties to the negotiated rulemaking or the agency promulgating the rule.

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[5] ACUS Recommendation 86-3, 1 C.F.R. § 305.86-3.

One of the by-products of the movement toward ADR and negotiated rulemaking is the need for agencies to develop methods for identifying qualified neutrals and acquiring their services. This process involves a number of issues that will be explored in this report. Among those issues are the following:

1. Qualifications. An agency dispute or rulemaking may involve technical issues arising under a complex regulatory scheme. How can agencies insure that neutrals that are hired to promote negotiation of settlements are qualified to assist the parties in sorting through such issues? Are technical expertise and substantive knowledge required, or do generic mediation skills suffice?

2. Procurement procedures. Statutes and regulations governing procurement of services by federal agencies require competition and specify a series of procedural steps for ensuring that competition is maximized. In some cases, these procedures may be inconsistent with the agency's need for expedition in acquiring the services of an outside neutral. Are there other ways in which agencies can acquire neutrals' services expeditiously within the competitive system mandated by statute and regulation?

3. Delegation. Most neutrals lack authority to render a decision that is binding upon either the agency or private parties. However, in the case of binding arbitration, questions continue to be raised about whether decisions delegated to executive agencies by Congress can be re-delegated to private parties for binding resolution. What are the potential "delegation" issues with respect to binding forms of ADR, particularly arbitration?

4. Long-term structural issues. The universe of neutrals who have specific experience in the experimental forms of ADR and negotiated rulemaking is presently very small. If the use of such techniques by agencies expands, how can agencies broaden the base of individuals or organizations who are available and are experienced in the arbitration/mediation/facilitation process? Should federal agencies develop a centralized roster of neutrals from which all agencies could draw? To what extent should the federal government utilize and

expand the capabilities of government employees in dispute resolution?

This report will explore these and other issues, drawing heavily upon the experience of agencies to date.

## II.

## ESTABLISHING QUALIFICATIONS

### A. Potential Criteria

The qualifications required to serve as a neutral vary depending upon the nature and complexity of the issues, the type of dispute resolution technique employed, and the size and importance of the dispute or regulation to be negotiated. In many cases, seeking an ideal combination of qualifications and experience would unduly limit the pool of individuals available to serve as neutrals. For example, only a handful of private parties have actual experience in convening or facilitating the negotiation of environmental regulations. Thus, in determining the criteria applicable to selection of a neutral, agencies will need to balance their desire for competence and experience against the need to avoid exclusivity.

There are various levels of training and experience that could be considered adequate to perform the function of a neutral in a given case:

1. General dispute resolution experience. Some of those contacted in connection with this report expressed the view that "mediation is mediation" -- that is, a person who has skill and experience in mediating disputes can perform the role of a neutral, regardless of the substantive issues involved. The Federal Mediation and Conciliation Service ("FMCS") has responsibility for mediating labor disputes under the Labor-Management Relations Act of 1947.[6/] But FMCS labor mediators have performed a variety of other dispute resolution functions. Recently, an FMCS mediator successfully acted as convenor of a negotiated rulemaking for the Federal Aviation Administration ("FAA") in

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[6/] 29 U.S.C. § 173.

developing proposed regulations concerning flight and duty time for aircraft crews.[7]

2. *Experience in specific ADR techniques*. As noted, agency experience with ADR and negotiated rulemaking has been relatively limited to date. If the selection of neutrals is confined to persons with direct experience in these techniques, the fear of exclusivity will become a reality.

3. *Technical expertise*. There is no denying that it would be useful in arbitrating a dispute regarding licensing of a pesticide under the Federal Insecticide Fungicide and Rodenticide Act to have a degree or some formal experience in chemical engineering. Similarly, knowledge or experience in the construction industry would aid a neutral in mediating the settlement of a construction dispute. Depending upon the nature of the issues involved, it may or may not be necessary to have such technical expertise in order to understand and communicate the conflicting positions of the disputants in a way that will promote settlement.

4. *Knowledge of the statutory/regulatory scheme*. Particularly in regulatory negotiation, familiarity with the legal framework in which the regulation is being developed may be an important criterion in selecting a neutral. In the arbitration setting, the Supreme Court upheld mandatory arbitration of Medicare claims by employees of private insurance carriers in part on the basis that agency regulations required such arbitrators to possess "a *thorough knowledge* of the Medicare program and the statutory authority and regulations upon which it is based . . . ."[8]

5. "*Absolute Neutrality*". Screening out potential neutrals who have a personal or financial interest in the proceeding will always be an important step

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[7] *See* Harter, *Regulatory Negotiation: The Experience So Far*, Resolve, Conservation Foundation 6-7 (Winter 1984); Perritt, *Analysis of Four Negotiated Rulemaking Efforts*, 1985 Recommendations and Reports of the Administrative Conference 637, 712-26.

[8] Schwieker v. McClure, 456 U.S. 188, 199 (1982) (emphasis in original).

in the selection process. But some agencies have gone beyond such basic conflict-of-interest considerations by insisting upon neutrals who have no past or present affiliation with any side of the controversy. Such insistence upon "absolute neutrality" could be an extremely limiting qualification, particularly since many of the persons who are most knowledgeable in a given regulatory scheme have been affiliated with either government or private industry, and sometimes both.

## B. Agency Experience

### 1. Minitrials

### a. Corps of Engineers

The agency that has had the most experience with minitrials is the U.S. Army Corps of Engineers.[9] In its Engineer Circular No. 27-1-3, dated September 23, 1985, the Corps has set forth detailed guidelines for the use of minitrials, together with a model "Minitrial Agreement".[10] The Engineer Circular specifies that the minitrial neutral advisor "must be an impartial third party with experience in government contracting and litigation."[11] In the two minitrials that the Corps has successfully completed to date, it has used a retired judge from the United States Court of Claims and a university professor of government contracts law as neutral advisors. Corps attorneys who are responsible for the minitrial program have stated their desire, at least at the initial stages of the minitrial program, to utilize neutral advisors who have no present or past affiliation with either the government or private construction contractors. This means that in the short term, the pool of persons who have the requisite neutrality and government contracts expertise to serve as neutral advisors for Corps of Engineers minitrails will be limited.

### b. Department of Justice

On June 19, 1986, the Commercial Litigation Branch of the Department of Justice issued a "Policy Concerning the Use of

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[9] See Ruttinger, Army Corps of Engineers Settles $45 Million Claim at Minitrial, Alternatives to the High Cost of Litigation, Center for Public Resources, vol. 3, no. 8 (August 1985).

[10] A copy of the Corps Circular, together with the model agreement, is reproduced as Appendix A to this Report.

[11] Engineer Circular No. 27-1-3 at 3.

Mini-trials,"[12] which encouraged Branch attorneys "to assess cases assigned to them for the potential for resolution by mini-trial . . . ."[13] The Policy provides that, where appropriate, the parties may agree upon a neutral advisor to assist the management officials in resolution of the dispute. With respect to the qualifications of the neutral advisor, the Policy states as follows:

> The neutral advisor should be a person with either legal or substantive knowledge in a relevant field. The neutral advisor should have no prior involvement in the dispute or the litigation and must possess no interest in the result of the mini-trial.[14]

### c. Department of the Navy

The Department of the Navy has embarked upon the experimental use of minitrials to resolve disputes arising under Navy contracts. The Navy has expressed a preference for utilizing administrative judges from the Armed Services Board of Contract Appeals ("ASBCA") to serve as neutral advisors. The ASBCA is one of the forums designated by the Contract Disputes Act of 1978[15] to conduct hearings and render decisions on disputes arising under government contracts. However, in its first minitrial of a contract dispute, the Navy utilized the services of the same university professor of government contracting who had earlier been employed by the Corps of Engineers as a neutral advisor.

### d. Department of Energy

The Energy Department has conducted a minitrial on a contract claim in which the neutral advisor was a former ASBCA judge who was practicing government contracts law with a private firm.[16]

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[12] Copy of this Policy is reproduced as Appendix B to this Report.

[13] Commercial Litigation Branch Policy Concerning the Use of Mini-trials (June 19, 1986) at 1.

[14] Id. at 3.

[15] 41 U.S.C. § 601 et seq.

[16] It is also possible to conduct a minitrial without utilizing a neutral advisor at all. This was done to resolve a contract dispute between the National Aeronautics and Space Administration and TRW Inc. See "Minitrial Successfully Resolves NASA-TRW Dispute," The Legal Times (September 6, 1982), p. 19.

### 2. Negotiated Rulemakings

Neutrals for "reg neg" procedures have come from several sources. In some cases, agencies have tapped the private sector for convenors and facilitators. In other cases, government personnel, including an FMCS mediator and a staff attorney for the rulemaking agency, have performed these functions.

#### a. Department of Interior

In January 1986, the Department of Interior issued a Request for Proposals for convening and facilitation services for negotiated rulemaking on air quality regulations for the California Outer Continental Shelf ("OCS"). The evaluation factors for this award are detailed, and include specific ability and achievement as a facilitator, knowledge of the Outer Continental Shelf Oil and Gas Program and the Outer Continental Shelf Lands Act, understanding of the needs of the Department of Interior and other parties to the rulemaking, general dispute resolution skills, and "practical knowledge of the convening/facilitating process."[17]

#### b. Council on Environmental Quality

In April 1986, the Executive Office of the President, on behalf of the Council on Environmental Quality ("CEQ"), issued a Request for Proposals ("RFP") for an indefinite quantity contract to supply various types of services in connection with negotiated rulemaking, including convening, facilitating, documenting, resource support, analytic support, and training. The RFP specified that the overall purpose of the contract is "to assist EPA, CEQ, and other participating agencies with joint projects in the area of regulatory negotiations."[18] In setting forth evaluation criteria for award, the solicitation states that technical proposals will be evaluated in part according to "the availability of an appropriate disciplinary mix of environmental scientists and technicians to accomplish tasks required under the scope of work."[19]

One of the successful offerors in the CEQ procurement, the Conservation Foundation, proposed a team approach in which each regulatory negotiation would be staffed by a "senior dispute resolution professional" and appropriate technical personnel selected in consultation with the agency.[20] The Foundation's proposal provided the following rationale for combining mediation and technical expertise:

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[17] Solicitation No. 3292, January 4, 1986, § M-2. Section M of the Solicitation, "Evaluation Factors for Award," is reproduced as Appendix C to this Report.

[18] Solicitation No. EOPOA-86-05, April 10, 1986, § C.2, p. 13.

[19] Id. § M.1. Section M of the Solicitation, "Evaluation Factors for Award," is reproduced as Appendix D to this Report.

> It is hard to imagine an environmental mediator being effective unless he or she has some expertise in the substance and the history of the issues at hand and, therefore, some understanding of the implications that various "process" choices have on the parties, e.g. in helping the affected interests decide how best to represent themselves, how to define the scope of issues to be negotiated, or what protocols to adopt. The stability both of the process and of a consensus agreement, if reached, is increased when the parties make these decisions in a well informed way.[21]

During negotiations leading up to contract award, the agencies (CEQ and EPA) took the position that inclusion of technical personnel on the regulatory negotiation team would not be acceptable. The rationale for the agencies' position was that while dispute resolution process skills are critical to the success of a negotiated rulemaking, technical expertise is not only unnecessary but, in some cases, counterproductive. Officials in charge of EPA's negotiated rulemaking project believe that if the negotiating group feels that it needs the assistance of a technical expert, the group itself should select that expert.

### 3. Summary

From the foregoing, it appears that during the experimental stages of ADR and negotiated rulemaking, agencies have sometimes opted for rather restrictive definitions of the qualifications required for neutrals. In some of the early regulatory negotiations, agencies have sought neutrals with a combination of skills that only very few individuals possess, including specific experience in facilitation of negotiated rulemakings and technical expertise in the subject matter of the rulemaking proceeding. In some cases, organizations have been able to respond to these demanding requirements through a "team approach," in which the skills of dispute resolution personnel and technical experts are combined. The agency that has the most experience in regulatory negotiation, the EPA, has consciously eschewed technical expertise as a criterion for selection of neutrals and has emphasized generic dispute resolution skills as the controlling factor.

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[20] Conservation Foundation, Technical Proposal EOPOA-86-05 -- Regulatory Negotiation Support Services, May 28, 1986, p. 7.

[21] Id.

In the case of the Corps of Engineers minitrial program, the Corps has consciously selected neutral advisors who are both "truly neutral" and expert in government contracts law applicable to the disputes. One goal of this approach is to isolate the minitrial process from political criticism at the early stages of its development. As the program progresses and the use of minitrials becomes more routine, the qualifications may be loosened, thus broadening the pool of available neutrals.

### C. Qualifications Required by Government Dispute Resolution Agencies

#### 1. Federal Mediation and Conciliation Service

The basic statutory charter of FMCS is set forth in Section 203 of the Labor-Management Relations Act of 1947:

> It shall be the duty of the Service, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation.[22]

FMCS employs approximately 240 mediators, stationed at 75 separate locations. The basic qualification for employment as an FMCS mediator is seven years experience in collective bargaining and/or labor-management relations. FMCS operates an intensive inhouse training program for its mediators.

#### 2. Community Relations Service

The function of the Community Relations Service ("CRS") is:

> To provide assistance to communities and persons therein in resolving disputes, disagreements, or difficulties relating to discriminatory practices based on race, color, or national origin which impair the rights of persons in such communities under the Constitution or laws of the United States or which affect or may affect interstate commerce.[23]

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[22] 29 U.S.C. § 173. Under the Health Care Amendments of 1974, FMCS is authorized to provide conciliation services to avert or minimize work stoppages in the health care industry. 29 U.S.C. § 183.

[23] 42 U.S.C. § 2000g-1.

CRS employs a total of 60 to 70 "conciliators" in its ten regional offices. There are no specified qualifications for entry-level conciliators, and most of the training is on-the-job.

## D. Rosters Maintained By Private Organizations

### 1. American Arbitration Association ("AAA")

The AAA maintains panels from which arbitrators may be chosen by parties who have agreed to arbitrate a dispute or disputes. The AAA has established separate panels of arbitrators for use in various types of commercial disputes. For example, for disputes arising under construction contracts, the AAA maintains a Construction Industry Panel. Members of the Construction Industry Panel are persons recommended by the National Construction Industry Arbitration Committee as "qualified to serve by virtue of their experience in the construction field."[24]

Federal agencies have from time to time used the AAA as a resource in establishing arbitration programs. For example, under the terms of the Superfund Statute, disputes arising out of claims against the fund are resolved by a Board of Arbitrators appointed by the President.[25] The Act provides that each member of the Board "shall be selected through utilization of the procedures of the American Arbitration Association."[26]

The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") authorizes the Environmental Protection Agency to use research data submitted by one manufacturer to register pesticides submitted by another manufacturer. The Act further provides that a manufacturer who depends upon data submitted by another firm to obtain registration must compensate that other firm, and that any disputes over the amount of compensation will be resolved through binding arbitration under the auspices of FMCS.[27] The statute requires that FMCS appoint an arbitrator from a roster of arbitrators maintained by the Service, and that the procedures and rules of the Service shall be applicable. In turn, FMCS regulations have adopted the roster of arbitrators maintained by the AAA to resolve FIFRA compensation disputes and have designated that the AAA rules and procedures shall be used.[28] The Supreme

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[24] American Arbitration Association, Construction Industry Arbitration Rules (January 1, 1986) at 3.

[25] Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9612(4)(A).

[26] Id.

[27] FIFRA, § 3(c)(1)(D)(ii), 7 U.S.C. § 136a(C)(1)(D)(ii).

[28] 29 C.F.R. § 1440.1.

Court upheld the FIFRA arbitration provision against constitutional challenge in Thomas v. Union Carbide Agricultural Products Co.[29]

2. Center for Public Resources ("CPR")

CPR is a private non-profit organization that is devoted to promoting the use of ADR to resolve commercial disputes, as well as disputes between private parties and the government. In furtherance of this purpose, CPR maintains a list of distinguished persons who are available to serve as mediators, arbitrators, or neutral advisors in resolving disputes through ADR. The CPR roster is a blue ribbon group consisting largely of retired federal judges, former cabinet officers, and other dignitaries.

## E. Conclusion

Because the substantive and procedural aspects of ADR vary significantly from case to case, it would be virtually impossible to develop a generalized set of qualifications applicable to all dispute resolution proceedings. Rather, agencies will need to take a practical approach to the selection of neutrals, balancing the demands of the specific ADR proceeding against the long-range need to develop a broader base of experienced neutrals from which to draw. While the diversity of proceedings makes specific advice hazardous, certain general guidelines can be gleaned from agency experience to date:

(1) Generic dispute resolution skills are an important prerequisite in most cases; insistence upon specific experience in the ADR process being pursued, however, many unnecessarily exclude persons whose general mediation skills are transferable to other contexts.

(2) Familiarity with the applicable statutory and regulatory scheme is generally desirable, particularly in negotiated rulemaking.

(3) Technical expertise should be required only when the substantive issues are so complex that the neutral could not effectively understand and communicate the parties' positions without in-depth technical knowledge.

(4) Avoiding conflicts of interest is important, but requiring "absolute neutrality" may unduly restrict the field of potential neutrals to retired judges or university professors.

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[29] ___ U.S. ___, 105 S.Ct. 3325 (1985).

## III.

## PROCUREMENT ISSUES

### A. The Federal Acquisition System

In some circumstances, it may be possible for agencies to retain neutrals as experts, consultants, or special employees.[10] In most cases, however, neutrals' services must be acquired through contracting with the private individual or organization.

Federal procurement of goods and services is a highly regulated form of contracting. The principal statutes are the Armed Services Procurement Act,[11] which governs military procurements, and the Federal Property and Administrative Services Act of 1949,[12] which governs procurements by civilian agencies. These statutes have undergone substantial revision in recent years, principally by the Competition in Contracting Act of 1984 ("CICA").[13] CICA mandates that as a general rule, federal agencies conducting a procurement for property or services "shall obtain full and open competition through the use of competitive procedures . . . ."[14] Prior to CICA, the Armed Services Procurement Act and Federal Property and Administrative Services Act expressed a preference for formally advertised procurements, in which competitors submit sealed bids and the lowest "responsive and responsible" bidder wins the contract. The prior statutes provided that agencies could negotiate a contract rather than engage in formal advertising if one of 17 exceptions were present; one of those exceptions was contracts for "personal or professional services."[15]

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[10] See discussion in Section III.D.4., infra.

[11] 10 U.S.C. § 2201 et seq (1982), as amended by Pub. L. No. 98-369, Title VII, 98 Stat. 1175.

[12] 41 U.S.C. § 251 et seq (1982), as amended by Pub. L. No. 98-369, Title VII, 98 Stat. 1175.

[13] Pub. L. No. 98-369, Title VII, 98 Stat. 1175. Other major procurement reform statutes of recent vintage include the Small Business and Federal Procurement Competition Enhancement Act of 1984, Pub. L. No. 98-577, and the Defense Procurement Reform Act of 1984, Pub. L. No. 98-525.

[14] Id., § 303(a)(1).

[15] Armed Services Procurement Act, 10 U.S.C. § 2304(a)(4) (1982).

CICA mandates full and open competition in any form, whether it be by formal advertising or negotiation.[16] The Act further provides that agencies may use procedures other than competition only when one of seven specific exceptions exists. These exceptions include situations when "the property or services needed by the executive agencies are available from only one responsible source and no other type of property or services will satisfy the needs of the executive agency . . ." or "the executive agency's need for the property or services is of such an unusual and compelling urgency that the government would be seriously injured unless the executive agency is permitted to limit the number of sources from which it solicits bids or proposals . . . ."[17] Procurements under one of the seven exceptions to competition are referred to as "sole source." CICA eliminated the former exception for procurements of personal and professional services.

Under the Office of Federal Procurement Policy Act,[18] both military and civilian agency procurements are governed by a unified regulatory system, the Federal Acquisition Regulation (FAR").[19] The FAR sets forth detailed procedures for conducting federal agency procurements. For procurements over $10,000, agencies generally must publish a synopsis of the proposed procurement in the Commerce Business Daily ("CBD") at least 15 days in advance of issuing the solicitation.[10] After the CBD synopsis, agencies must allow at least 30 days response time for receipt of bids or proposals.[11] The agency's evaluations of bids or proposals usually takes a minimum of 30 days, although no minimum time is specified in the regulation. Thus, a competitive procurement under the procedures specified by FAR can be expected to take a minimum of two to three months.

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[16] CICA now refers to formal advertising as "sealed bids." Under the statute, sealed bids are appropriate in the following circumstances:

(i) time permits the solicitation, submission, and evaluation of sealed bids;

(ii) the award will be made on the basis of price and other factors;

(iii) it is not necessary to conduct discussions with the responding sources about their bids; and

(iv) there is a reasonable expectation of receiving more than one sealed bid.

41 U.S.C. § 253(a)(2)(A); 10 U.S.C. § 2304(a)(2)(A). See also, 48 C.F.R. § 6.401(a)(1)-(4).

[17] Id., § 303(c)(1) & (2).

[18] 41 U.S.C. § 405(a).

[19] 48 C.F.R., Chapter 1, Parts 1-53. Each agency has promulgated supplements to the FAR to deal with that agency's unique acquisition problems. See, e.g., DOD FAR Supplement, 48 C.F.R. Chapter 2.

The FAR also specifies procedures for sole source procurements -- that is, non-competitive procurements conducted under one of the seven exceptions established by CICA. In order to conduct a sole source procurement, the agency's contracting officer must provide a written justification for negotiating with only one source and must obtain the approval of his superiors in the procurement chain, at an increasingly higher level depending upon the size of the procurement.[12] The justification must contain, among other things, an identification of the statutory authority for proceeding on a basis other than full and open competition; a demonstration that "the proposed contractor's unique qualifications or the nature of the acquisition requires use of the authority cited;" a description of efforts made to ensure solicitation of offers "from as many potential sources as practicable;" and a determination that the anticipated cost of the government will be "fair and reasonable."[13] In addition, the contracting officer must conduct a "market survey" to determine whether other qualified sources capable of satisfying the government's requirement exists.[14] The written justification for a sole source procurement is public information that is available for inspection by disappointed bidders, among others.[15]

The competitive requirements of CICA are enforceable through a number of different actions available to disappointed bidders or offerors. An interested party who alleges a violation of a procurement statute or regulation may file a protest with the Comptroller General.[46] When such a protest is filed, the agency must suspend award or performance of the contract until the protest has been decided, unless the head of the agency finds that award or performance is warranted because of "urgent and compelling circumstances."[47] For procurements of automatic data processing equipment, such protests, with similar suspension provisions, may be filed with the General Services Board of Contract Appeals.[48] In addition, under the Federal Court Improvements Act of 1982, disappointed bidders or offerors may seek to enjoin award of a contract allegedly tainted by illegal action by filing suit in the U.S. Claims Court.[49] Traditionally, federal district courts have also entertained suits to enjoin the award or performance of federal contracts when the agency allegedly violated its mandate to promote full and open competition.[50]

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[10] 48 C.F.R. § 5.201(a) and § 5.203(a). The requirement for a CBD synopsis is imposed by the Small Business Act, 15 U.S.C. § 637(c) and the Office of Federal Procurement Policy Act, 41 U.S.C. § 416. The Continuing Resolution for Appropriations FY1987 contains an exemption for solicitations between $10,000 and $25,000 when the agency reasonably expects to receive at least two offers from responsive and responsible offerors. Pub. L. No. 99-500, October 18, 1986, Title IX, Section 922.

[11] 48 C.F.R. § 5.204(b).

[12] 48 C.F.R. §§ 6.303-2, 6.304.

[13] 48 C.F.R. § 6.303-2(a).

[14] 48 C.F.R. §§ 6.303-2(a)(8), 7.101.

[15] 48 C.F.R. § 6.305(1).

### B. Issues in Contracting for Neutrals' Services

The overriding requirement of free and open competition, together with the detailed acquisition procedures prescribed by the FAR, raise a number of issues when agencies seek to acquire the services of neutrals. The first and most obvious issue is time. For any procurement over $10,000, a notice of the solicitation must be placed in the CBD, the agency must wait 15 days before issuing the solicitation, and 30 days must pass before bids or offers can be received. When the time for evaluating proposals is added, the process consumes a minimum of two to three months. Practically speaking, most fully competitive negotiated procurements take several months. In the case of the competitive procurement for convening and facilitating services conducted by the Department of Interior in connection with the California Outer Continental Shelf rulemaking, the entire procurement process, from development of the terms of the solicitation through the award of the contract, took over a year.

The protracted nature of the standard procurement process is often inconsistent with the goals of ADR and negotiated rulemaking. The very purpose of ADR is to avoid the delays inherent in the normal litigation process. Introducing several months of delay while the services of a neutral are procured could be viewed as self-defeating. Similarly, a lengthy acquisition process for the convenor or facilitator may be unacceptable when an agency is seeking to expedite the development of rules affecting the environment or health and safety.

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[46] 31 U.S.C. § 3552.

[47] 31 U.S.C. § 3553.

[48] 40 U.S.C. § 759(h).

[49] 28 U.S.C. § 1491(a)(3).

[50] *See*, Control Data Corporation v. Baldrige, 655 F.2d 283 (D.C. Cir.), *cert. denied*, 454 U.S. 881 (1981); Merriam v. Kunzig, 476 F.2d 1233 (3rd Cir.), *cert. denied*, 414 U.S. 911 (1973); Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970).

A second problem is that, as discussed above, the requirement of "full and open competition" may be inconsistent with the agency's need to acquire the services of a neutral who meets a number of specific criteria. Particularly at the formative stages of ADR and negotiated rulemaking, there are only a handful of individuals and organizations that have the combination of specific experience in the procedure plus technical expertise in the substantive issues. To the extent such qualities are important to successful resolution of the issue, the field of available neutrals may be very limited, until further experience results a development of a broader base. In the case of neutral advisors for minitrials, the fact that the neutral is generally selected by agreement between the private party and the government may mean that there is only one "qualified source." Yet the market surveys, sole source determinations, and gamut of agency approvals required by Parts 6 and 7 of the FAR may make it difficult for an agency to proceed on a sole source basis in a timely fashion.[51]

A third issue arises with respect to the consideration of price in the evaluation of proposals. CICA mandates that the contract will be awarded to the "responsible source whose proposal was most advantageous to the United States, considering only price and the other factors included in the solicitation."[52] One of the principal purposes of full and open competition is to obtain the lowest available price for the federal government.[53] The requirement of some form of price competition may be inconsistent with the need to obtain the services of neutrals who have the requisite experience and reputation, as well as the neutrality, to gain the confidence of the parties and bring delicate negotiations to a satisfactory conclusion.[54] The FAR is at least of some help in this regard because it recognizes that price competition may not be appropriate in certain circumstances, including acquisitions of "professional services":

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[51] In addition, the Comptroller General has stated that sole source procurements under CICA will be closely scrutinized. Daniel H. Wagner Associates, Inc., B-220633, 86-1 CPD ¶ 166 (Feb. 18, 1986); WSI Corp., B-220025, 85-2 CPD ¶ 626 (Dec. 4, 1985).

[52] Pub. L. No. 98-369, § 2711(d)(4), 41 U.S.C. § 253(b)(d)(4).

[53] See Control Data Corporation v. Baldrige, supra note 50, 655 F.2d at 295.

> While the lowest price or lowest total cost to the Government is properly the deciding factor in many source selections, in certain acquisitions the Government may select the source whose proposal offers the greatest value to the Government in terms of performance and other factors. This may be the case, for example, in the acquisition of research and development or professional services, or when cost-reimbursement contracting is anticipated.[55]

Finally, some of those contacted in connection with this study expressed concern that the services of neutrals could be considered "personal services." As a general rule, the government must secure personal services through employment rather than contract. Agencies are not permitted to award personal services contracts in the absence of specific statutory authorization.[56] These restrictions do not appear to be a significant concern under the regulatory definition of "non-personal services contract":

> [A] contract in which the personnel rendering services are not subject, either by the contract's terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the Government and its employees.[57]

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[54] Acquisition of the services of neutrals is at least roughly parallel to procurement of architect/engineer services, which is governed by the Brooks Act. 40 U.S.C. §§ 541-44. The Brooks Act provides that "the agency head shall negotiate a contract with the highest qualified firm for architectural and engineering services at compensation which the agency head determines is fair and reasonable to the Government." 40 U.S.C. § 544(a) (emphasis added).

[55] 48 C.F.R. § 15.605(c).

[56] 48 C.F.R. § 37.104(a), (b).

[57] 48 C.F.R. § 37.101.

Since neutrals by definition act independently and are subject to no one's supervision, their services can generally be regarded as "non-personal."[58]

C. Case Studies

1. Corps of Engineers Minitrials

The minitrial has several distinctive features that dictate the procurement procedures to be followed. First, a minitrial is by definition an extremely abbreviated hearing before senior executives of the two parties and the neutral advisor, if one is employed. Under the Corps' model minitrial agreement, the proceeding is scheduled to last two days, with a limited period for negotiating a settlement thereafter.[59] Second, the government and the private party to the dispute generally share the cost of the neutral advisor's services.[60] Third, the agency and the private party must agree on the selection of the neutral.

Given the first two factors (the abbreviated nature of the minitrial and equal sharing of costs by the private parties), acquisition of the services of the neutral advisor should seldom if ever cost the government more than $10,000, at least at current prices. This means that some of the formalities of the procurement process can be dispensed with. Procurements under $10,000 need not be advertised in the CBD.[61] In addition, the low-dollar amount of neutral advisor acquisitions means that agencies can avail themselves of the small purchase procedures (under $25,000) of FAR Part 13.1. These procedures allow the agencies to procure on a more informal basis, such as soliciting quotations orally rather than through a formal request for proposals. The Corps used the small purchase procedures, without a CBD announcement, in acquiring the services of neutral advisors for both of its prior minitrials. The Department of the Navy used the same procedure in retaining a neutral advisor for its minitrial of a cost allowability dispute.

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[58] See 61 Comp. Gen. 69, 72-74 (1981) (agency authorized to contract for legal services because law firm acted as an independent contractor and was not subject to agency supervision).

[59] Engineer Circular No. 27-1-3 at A-8. The first Corps minitrial required two days of hearings while the second lasted approximately three days. See Army Engineers Succeed in First Minitrial, Alternatives to the High Cost of Litigation, Center for Public Resources, vol. 3, no. 3 at 1 (March 1985); Ruttinger, Army Corps of Engineers Settles $45 Million Claim at Minitrial, Alternatives to the High Cost of Litigation, Center for Public Resources, vol. 3, no. 8 at 1 (August 1985).

[60] Engineer Circular No. 27-1-3 at A-4, ¶ 6.

[61] 48 C.F.R. § 5.201(a).

### 2. Department of Interior OCS Negotiated Rulemaking

As noted above, the Department of Interior used full competitive procedures to acquire convening/facilitating services for regulatory negotiation of environmental rules applicable to the California OCS development. This involved the development and issuance of a 62-page request for proposals, which detailed the nature and scope of the services to be provided as well as the evaluation factors for award. An announcement of the solicitation was published in advance in the CBD. Seven firms submitted offers on the solicitation, followed by detailed evaluation and negotiations. Ultimately, a cost-reimbursement type contract was awarded to the Mediation Institute of Seattle, Washington.

The evaluation factors for award in the solicitation focused upon the experience and technical expertise of the offerors. Points were assigned to each of the five separate categories, comprising experience (30 points), understanding of the problem (25 points), dispute resolution skills (25 points), technical approach (10 points), and personnel staffing (10 points). No numerical weight was assigned to the cost proposal. The solicitation stated as follows:

> In evaluating proposals for a cost reimbursement type contract, estimated costs of contract performance and proposed fees will not be considered as controlling factors, since in this type of contract advance estimates of costs may not provide valid indicators of final actual costs. There is no requirement that cost reimbursement type contracts be awarded on the basis of either (a) the lowest proposed cost, (b) the lowest proposed fee, or (c) the lowest total estimated cost plus proposed fee.[62]

The solicitation went on to state that the cost proposal was required to reflect a "realistic and reasonable approach" to the contract.

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[62] Solicitation No. 3292, § M-3, pp. 66-62. See 48 C.F.R. § 15.605(d).

### 3. CEQ Procurement of Regulatory Negotiating Services

#### a. Historical Background

EPA has been one of the most active agencies in promoting regulatory negotiation. EPA has several "reg negs" in process and has used the procedure to complete two sets of regulations: nonconformance penalties under Section 206(g) of the Clean Air Act and pesticide exemptions under Section 18 of the FIFRA.[63] In the case of the nonconformance penalties rulemaking, EPA employed the services of ERM-McGlennon Associates as the convenor/facilitator.[64] In the second rulemaking, regarding pesticide exemptions, ERM-McGlennon Associates was used as the convenor, but the facilitator was an employee of EPA's Office of General Counsel. In acquiring the services of the outside convenor/facilitator, EPA utilized a basic ordering agreement, which is a form of contracting described in FAR Subpart 16.7.

#### b. The CEQ Procurement

In April 1986, CEQ undertook to acquire convening, facilitating and related services for use by EPA in its ongoing regulatory negotiation project, and by other agencies interested in launching similar projects. CEQ did so pursuant to its statutory role as a clearinghouse for hiring experts and consultants in furtherance of environment policy.[65] The procurement was conducted by a contracting officer for the Executive Office of the President ("EOP"). The EOP synopsized the solicitation in the CBD, and received some 200 requests for the RFP. Ultimately, however, only four organizations submitted offers.

The RFP solicited proposals on seven different categories of convening, facilitating, and related services.[66] The RFP contemplated the award of one or more indefinite quantity contracts for a one-year period, plus two option years. Under the terms of the RFP, the agency could have awarded separate contracts for each of the seven different types of services. In fact, one contract was awarded for six categories of services to the Conservation Foundation, a nonprofit environmental research organization, and a separate contract for the seventh category was awarded to the

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[63] See Perritt, Analysis of Four Negotiated Rulemaking Efforts, 1985 Recommendations and Reports of the Administrative Conference 637, 726-745.

[64] Mr. McGlennon was an experienced environmental mediator and former administrator of EPA Region 1.

[65] 42 U.S.C. § 4343.

[66] These services included convening, facilitating, documenting, resource support, analytic support, and training.

National Institute for Dispute Resolution ("NIDR"). While the RFP described the regulatory negotiation project as arising out of the program initiated by EPA, the terms of the RFP made clear that the services being procured were for the purpose of assisting EPA, the Office of Environmental Quality ("OEQ") and "other participating agencies" with joint projects in regulatory negotiations.

### c. The Request for Proposals

Under the terms of the RFP, offerors were to propose a roster of professionals who would be available to perform the various services called for under the contract. These categories included "professional," defined as convenors, facilitators, analysts, and trainers, and "administrative personnel," defined as documentors, direct support staff, resource support staff, and management/clerical positions. For each category and subcategory of personnel, the offeror was to propose a base period hourly rate, and rates for the first and second options under the contract. The offerors were also required to propose percentage ceiling rates for such items as fringe benefits, overhead, general and administrative expense, and profit/fee. As required by the regulations governing indefinite quantity contracts,[67] the RFP specified a minimum order quantity of $5,000 and maximum of $175,000.

The evaluation section of the RFP made it clear that each of the seven discrete categories of services (i.e., convening, facilitating, document support, etc.) would be evaluated separately. The EOP reserved the right to award separate contracts for each category or more than one contract for a given category. The evaluation factors were stated as follows:

> The Technical proposals will be evaluated according to the offeror's understanding of the requirements of the Solicitation and the availability of an appropriate disciplinary mix of environmental scientists and technicians to accomplish tasks required under the scope of work . . . . The Technical Proposal will also be rated as to the approach, methodology, and accuracy of Work Plan for the Benchmark Task Order.
>
> The Cost Proposal will be evaluated according to the relative costs set forth in the tables prepared in accordance with Section B of the RFP.[68]

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[67] 48 C.F.R. §16.504(a)(1).

[68] Solicitation No. EOPOA-86-05, § M.1, p. 85.

The RFP contained a "benchmark task order" describing a hypothetical EPA negotiated rulemaking[69] Each offeror was required to submit a work plan outlining the offeror's proposed approach, staffing, management plan, and schedule for this hypothetical task order.

Under the terms of the indefinite quantity contract, work is commissioned on particular regulatory negotiations through the issuance of task orders. The task order defines the scope of the work required, the estimated period of performance, and the estimated level of effort.[70] Within the time period specified in each task order (expected to be a week or two), the contractor is required to submit a proposed work plan outlining the contractor's objectives, approach, statement of work, deliverables, staffing arrangements, management plan, schedule, and cost/price assumptions.[71] The contractor is also required to submit a separate cost analysis providing a breakdown of costs and specifying the type of contract desired, i.e., firm fixed-price, cost plus fixed-fee, or labor hour. It is contemplated that the agency can negotiate with the contractor regarding each aspect of the work plan, including the personnel who are proposed. The RFP specifically states that the government reserves the right "to award the task orders in any order, or not to award."[72]

In the eyes of the EOP, CEQ, and EPA, the principal advantage to this indefinite quantity contract is its flexibility. Rather than having to go through a fully competitive process for each and every regulatory negotiation, the EOP conducted a competitive procurement for the initial indefinite quantity contract. Under the terms of the contract, task orders can be issued and negotiated with the contractor for each separate rulemaking within a matter of weeks, thus shortening the period required to engage the services of a convenor or facilitator. By engaging groups like the Conservation Federation and National Institute for Dispute Resolution, CEQ, EPA, and other agencies have ready access to the rosters of experienced professionals that those groups have retained as employees or subcontractors.

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[69] The Benchmark Task Order is reproduced as Appendix E to this Report.

[70] Solicitation No. EOPOA-86-05, § H.9, p. 27.

[71] The Benchmark Task Order in the RFP states that a firm fixed-price order is anticipated.

[72] Solicitation No. EOPOA-86-05, § H.9, p. 28.

### 4. Use of Government "Neutrals"

Another possibility for obtaining services of neutrals is to utilize government personnel. This has been done in at least two cases: the FAA negotiated rulemaking regarding flight and duty time for aircraft crews and the EPA's regulatory negotiation regarding pesticide exemptions. In the former case, a mediator from FMCS was employed as the convenor/facilitator; in the latter case, an employee from the EPA's Office of General Counsel was used. In addition, OSHA is now undertaking its second negotiated rulemaking with the intent of using an FMCS mediator.[73]

## D. Evaluation of Techniques

### 1. Full Competitive Procurement

The most straightforward approach to acquiring the services of a neutral is that utilized by the Department of Interior for the California OCS rulemaking. The agency conducted an open competition for the contract in which seven offerors submitted proposals. The agency also ensured that a qualified source would be selected by specifying detailed technical evaluation factors, and making these technical factors the exclusive basis for evaluation of the proposals. By obtaining cost proposals but not making cost an evaluated factor, the agency avoided potential problems inherent in selecting a provider of professional services on the basis of cost rather than professional experience or expertise.

However, the principal disadvantage of a fully competitive procurement is the time and effort required, which in most cases make full competition impractical for an individual dispute resolution or regulatory negotiation. From start to finish, the Interior Department procurement of convening and facilitating services took over a year. The successful offeror submitted a detailed, two-volume proposal that took months to prepare and was estimated to cost several thousand dollars. Thus, while fully competitive procurements are the most desirable and compliant with statutory requirements, they may be impractical when time is of the essence.

### 2. Small Purchases

Use of the small purchase procedures provided for in FAR Subpart 13.1 should work for most procurements of neutral advisor services, and possibly in the case of small arbitrations and regulatory negotiations. As noted, in virtually all cases, contracts with minitrial neutral advisors should involve expenditure of under $10,000 by the government. Thus, no announcement in the CBD is required, and the streamlined procedures for small purchases can be utilized. In its two successful minitrials, the Corps of Engineers has contracted with the neutral advisor through a purchase order issued based upon an oral quotation. In each case, the purchase order was accompanied by a tripartite agreement among the neutral advisor, the government, and the private party to the dispute.[74]

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[73] In the past, agencies that have used FMCS mediators have paid a pro rata share of the mediator's salary through an inter-agency transfer of funds pursuant to the Economy Act, 31 U.S.C. § 1535.

Even for small purchases, however, agencies are required to obtain competition "to the maximum extent practicable."[75] Solicitations may be limited to one source only "if the contracting officer determines that only one source is reasonably available."[76] However, unlike the procedures specified in Parts 6 and 7 of the FAR for larger procurements, sole source purchases under the small purchase procedures do not require a written determination by the contracting officer or approvals by senior procurement officials. In the case of minitrial neutral advisors, sole source procurements should be justified on the basis of the need for prompt action to effect a settlement, the limitations on the number of qualified sources, and the fact that the selection of the neutral advisor must be approved in advance by the private party to the dispute.

Similar factors may control the hiring of arbitrators and mediators -- i.e., joint selection and sharing of fees by the agency and private party to the dispute. In arbitrations or mediations of smaller disputes that take a few days to resolve, the small purchase procedures should be available for acquisition of the neutral's services.

### 3. Indefinite Quantity Contracts

As noted above, the indefinite quantity contract used by the CEQ to procure convening and facilitating services for the EPA and other agencies is a flexible procedure. Under the regulations, this type of contracting may be used when "the Government cannot predetermine . . . the precise quantities of supplies and services that will be required during the contract period . . . ."[77] --

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[74] A redacted copy of the Agreement for Services of Neutral Advisor utilized in one of the minitrials is reproduced in Appendix F hereto.

[75] 48 C.F.R. § 13.106(b)(1).

[76] Id.

[77] 48 C.F.R. § 16.504(b)(1). See generally Virden, Indefinite Delivery Contracts, Government Contractor Briefing Papers No. 78-2, Federal Publications (April 1978).

precisely the situation that may exist when an agency embarks upon a regulatory negotiation project. Full and open competition, as required by CICA and the procurement regulations, takes place in response to the RFP for the indefinite quantity contract. Once the contract has been awarded, acquisition of services for each separate regulatory negotiation is done through the task order/work plan procedure described above. The contractor can respond to each task order much more quickly than if full competitive procedures were required for each separate rulemaking.

Use of the indefinite quantity contract for this purpose raises several issues. First, the regulations specify that such contracts should be used only for "commercial or commercial-type products."[78] "Commercial product" is defined as something that is "sold or traded to the general public in the course of normal business operations at prices based on established catalog or market prices . . . ."[79] A "commercial-type product" is a commercial product that has been modified to meet some peculiar requirement of the government. A case could presumably be made that the mediation-type services provided by convenors and facilitators are also sold or traded in the commerical market. It is less clear whether such services are sold "to the general public" at "established catalog or market prices". Since the "commercial product" restriction is not mandatory, however, it should not pose an insuperable barrier to the use of indefinite quantity contracts for ADR-related services.

Second, the regulations require that an indefinite quantity contract specify a "minimum quantity" of the item to be procured, and further that such minimum quantity must be more than a "nominal" amount.[80] This is necessary to avoid an illusory contract under which the government has no obligation to do anything in return for the contractor's agreement to fill orders.[81] In the regulatory negotiation and ADR context, it is obviously difficult to specify a minimum *quantity* of services to be procured. In a somewhat parallel context, the Court of Claims upheld an indefinite quantity contract for various categories of construction work where the "minimum quantity" specified in the contract was a payment of $5,000.[82]

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[78] 48 C.F.R. § 16.504(b).

[79] 48 C.F.R. § 11.001.

[80] 48 C.F.R. § 16.504(a)(2).

[81] *See* Mason v. United States, 615 F.2d 1343, 1346 n.5 (Ct. Cl. 1980), *citing*, Willard Sutherland & Co. v. United States, 262 U.S. 489, 493 (1923).

Third, the task order procedure specified in the RFP allows the agency and the contractor to negotiate the terms of each individual task order, including the personnel who will be assigned to a particular project and, presumably, the cost of those services. In the typical indefinite quantity contract for a commercial product sold at a catalog price, the agency issues an order for a given quantity and the contractor fills the order at the price specified in the contract. That price was, of course, established through competition for the initial contract. In the case of the EOP/CEQ procurement of convening and facilitating services, the mix of services, the personnel supplied to provide the services, and even the cost of the services (within the ceilings specified in the contract) are subject to negotiation for each individual task order. Both the government and the contractor have the right not to go forward with the particular task order if the detailed terms of the order and work plan cannot be agreed upon. This leaves the arrangement open to the criticism that each task order is in fact a separate procurement that should be conducted on a competitive basis, rather than through a de facto "sole source" process under the indefinite quantity contract.

A further problem in this regard may be that the service providers in each case are subcontractors to the organization that is performing the indefinite quantity contract. By allowing the agency and the contractor to negotiate the identity of the "subcontractor" for each separate task order, the indefinite quantity contract may in effect allow the agency to select a sole source for each separate regulatory negotiation without complying with the sole source justification procedures of the regulations.

These potential problems may be ameliorated by the fact that the material terms of each work plan -- including ceilings on cost and rates, identity of the service providers, and general approach and methodology -- were defined in the proposals submitted in response to the competitive RFP. So long as the parties adhere to those terms in negotiating individual task orders, sole source issues should be avoided.

In summary, the EOP/CEQ's use of indefinite quantity contracts is an imaginative application of an existing procurement techique to the peculiar needs of the regulatory negotiation setting.

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[82] Mason v. United States, supra note 81. See also, Hemet Valley Flying Service Co. v. United States, 7 Cl. Ct. 512 (1985) (indefinite quantity contracts for flying services upheld, although contract required no minimum purchase of services, because contractor was paid a dollar amount to maintain the availability of his aircraft for government use).

### 4. Other Potential Acquisition Techniques

#### a. Basic Ordering Agreements

Prior to the CEQ indefinite quantity contract, the EPA procured convening and facilitating services for its regulatory negotiation project through basic ordering agreements under FAR Subpart 16.7. A basic ordering agreement is not itself a contract, but rather an agreement specifying a product or service to be procured, the contract clauses that will apply to future contracts, and other terms and conditions as negotiated between the government and the contractor. The agreement contemplates that orders can be issued during the term of the agreement and that each such order will become a separate contract upon acceptance by the contractor. The basic ordering agreement is also required to specify a method for pricing future orders.

The basic ordering agreement theoretically eliminates some of the formal steps required in competitively procuring services of a convenor/facilitator for each negotiated rulemaking. By entering into such an agreement with a mediation/facilitation firm, EPA was able to issue orders for services as each new regulatory negotiation arose. However, use of basic ordering agreements became less attractive when recent revisions to the FAR required that, before issuing an order under a basic ordering agreement, a federal agency must obtain competition in accordance with Part 6 of the FAR.[83] This means that each order under a basic ordering agreement is, in effect, a separate competitive procurement subject to the same procedures and requirements as would apply to a new contract. Thus, some of the gains in efficiency previously achieved by using basic ordering agreements have been diminished.

#### b. Blanket Purchasing Agreements

Blanket purchasing agreements, which are not contracts, are the equivalent of government charge accounts with qualified sources of supply.[84] These are used for simplifying purchasing when a wide variety of items in a broad class of goods is generally purchased, but the exact items, quantities and delivery requirements are not known in advance and can be expected to vary widely, or where an agreement may avoid the necessity of writing a large number of purchase orders.[85] Blanket purchasing agreements are small purchase procedures and cannot cumulatively exceed the dollar limitations for small purchases ($25,000). Use of a blanket purchase agreement does not justify sole source purchases.[86]

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[83] 48 C.F.R. § 16.703(d)(1).

[84] 48 C.F.R. § 13.201(a).

[85] 48 C.F.R. § 13.203-1.

Such agreements do not appear to be especially useful as procedures for contracting with ADR neutrals. The dollar limitations are too low for regulatory negotiation (but could pay for individual arbitrators or minitrial neutrals), the services would not be the sort of standard, frequently purchased item contemplated by the regulations, and such an agreement is not a contract and could not be used to bind anyone to performance. Nor does the existence of a blanket purchase order remove the requirements for obtaining competition.[87]

### c. Supply Schedules

The federal supply schedule program[88] provides agencies with a simplified process for acquiring commonly used supplies and services. Under a supply schedule, contractors agree to fill relatively small individual orders from agencies at price discounts normally available only with commercial volume purchases, in return for a promise by the government that certain agencies will obtain all of their requirements for the contract items by purchasing from the schedule. While one of the main purposes of the supply schedule program is to obtain this price advantage for the government, a second purpose is to provide a mechanism by which agencies can obtain goods and services for which there is a recurrent need without struggling through the rigors of the normal procurement process. The supply schedule mechanism, or the variant thereof, presents obvious possibilities for the acquisition of the services of mediators, facilitators, arbitrators, and perhaps other ADR professionals.

A supply schedule is maintained by an administering agency. Most existing schedules are managed by the General Services Administration, but other agencies can be authorized to administer schedules.[19] A supply schedule is often a multiple award[20] contract in which all offerors who meet the criteria for inclusion are placed on the schedule. Full competition is used to select qualified suppliers through an ordinary contracting process that may be by sealed bids or by proposals and negotiation,[21] as appropriate.

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[86] 48 C.F.R. § 13.204.

[87] _See_ 48 C.F.R. § 16.703(d).

[88] FAR Subpart 38.1 specifies the salient legal characteristics of the contract device, and FAR Subpart 8.4 contains instructions for use by federal agencies in making purchases from a supply schedule. 48 C.F.R. Parts 8.4, 38.1.

One or more "mandatory" agencies are designated by the schedule administrator as being required to purchase all of their requirements for the included goods or services from schedule suppliers.[22] The designated agencies need not engage in competitive considerations,[23] but may obtain their needs by direct order from any schedule supplier. Exceptions to the mandatory purchase requirements are available, but do not provide much latitude to purchase non-schedule items. Urgent needs that cannot be filled by allowing a schedule contractor to accelerate the agreed-upon delivery terms can be obtained off-schedule.[24] If a mandatory agency finds a schedule item available from a non-schedule supplier at a lower price, then the agency can purchase off-schedule -- but only after obtaining full competition.[25]

Non-mandatory agencies, while not required to purchase from the schedule, have the option to do so at the specified schedule prices.[26] A schedule contractor is not required to fill orders from the non-mandatory agencies, but he is encouraged to do so.[27]

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[19] 48 C.F.R. § 38.101(e). The GSA must authorize another agency to award a schedule contract.

[20] A single award schedule is also possible (48 C.F.R. § 38.102-1), and, in fact, is the preferred mechanism (48 C.F.R. § 8.403-1).

[21] Multiple award schedules are always negotiated. 48 C.F.R. § 38.102-2(a).

[22] 48 C.F.R. § 38.101(b).

[23] In fact, competitive procedures, such as soliciting bids from schedule suppliers, is prohibited. 48 C.F.R. § 8.404(b).

[24] 48 C.F.R. § 8.404-1(a).

[25] 48 C.F.R. § 8.404-1(e).

[26] 48 C.F.R. § 38.101(c).

[27] 48 C.F.R. § 8.404-2(b).

If the contractor accepts an order from an optional agency, he must comply with the pricing and delivery terms of the schedule.[98]

Where more than one supplier qualifies under a multiple award, then no supplier is entitled to make any sales under the schedule, although the mandatory agencies are still bound to obtain their requirements from schedule suppliers. This entitles a schedule supplier to some relief in the event a mandatory agency illegally purchases "off-schedule" (which may include acquiring the schedule items from another government agency[99]).

In the context of ADR services, one salient feature of ordinary supply schedules may require modification. Under current rules, a qualifying offeror must agree to deliver services on the same terms (in particular, volume pricing discount schedules) as the offeror makes available to its best commercial customers. This appears to have little meaning in the ADR services situation, although a requirement that offerors quote rates equivalent to their commercial rates, if any, may be appropriate. This particular feature reportedly has caused many desirable firms to avoid supply schedule contracts, because of the possibility that they would be required to sell at high-volume prices, whereas they might have the opportunity to fill only low-volume orders.[100]

### d. Hiring Neutrals as Consultants, Experts, or "Special" Government Employees

Several statutes authorize federal agencies to obtain the services of consultants or experts, either by hiring them as federal employees on a short-term or interim basis, or by contracting for their services.[101] The most important of these laws is 5 U.S.C. § 3109, which provides, in pertinent part:

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[98] Id.

[99] For example, the Department of Defense was held to have breached a requirements contract by ordering items covered by the contract from GSA. Inland Container v. United States, 206 Ct. Cl. 478, 512 F.2d 1073 (1975).

[100] See W. Goodrich & C. Mann, Avoid Disaster in Federal Supply Schedule Contracts, 15 Pub. Cont. L.J. 1 (1984) for a review of pitfalls facing supply schedule contractors.

[101] Examples: 5 U.S.C. § 575 (Administrative Conference); 7 U.S.C. § 1642 (Department of Agriculture, rate not to exceed $50 per day); 21 U.S.C. § 1116 (Food and Drug Administration, six persons may be so employed with no time limitations); 22 U.S.C. § 290(F) (Inter-American Foundation); 29 U.S.C. § 656 (Department of Labor, contracts may be renewed annually); 33 U.S.C. § 569A (Corps of Engineers); 40 U.S.C. § 758 (General Services Administration); 49 U.S.C. § 1657(B) (Department of Transportation, pay not to exceed $100 per day).

> When authorized by an appropriation or other statute, the head of an agency may procure by contract the temporary (not in excess of one year) or intermittent services of experts or consultants or an organization thereof, including stenographic reporting services. Services procured under this section are without regard to:
>
> (1) the provisions of this title governing appointment in the competitive service;
>
> (2) chapter 51 [civil service classifications] and subchapter iii of chapter 53 [pay] of this title; and
>
> (3) section 5 of title 41 [requirements for advertising of contracts] . . . .

Section 3109 confers on those agencies that have the appropriate authorization in an organic or appropriation statute[102] the ability to employ consultants or experts without regard to civil service competitive hiring restrictions. In the context of ADR neutrals, experts are of most interest here as a consultant serves primarily "as an advisor to an officer" but "neither performs nor supervises performance of operating functions."[103]

Agencies can retain experts and consultants on a full-time basis for only one year, although many of the authorizing statutes allow for annual renewals. Experts and consultants can be hired on an intermittent basis -- that is, from time to time, working up to 130 days in a year -- for an indefinite period.[104] The pay is set by the employing agency, and may be up to the rate of pay for level V of the Executive Service.[105] No retirement benefits are accorded, and, unless required by other statutes, no holidays or overtime are provided for. Employees in this category are "per diem" employees, even if their tour of duty is for one year.

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[102] The Department of Defense Authorization, for example, have been contained in the yearly DOD appropriations acts.

[103] 23 Comp. Gen. 497 (1944); Federal Personnel Manual ("FPM") 304-1-2(1).

[104] FPM 304-1-2(5), (6).

[105] 5 U.S.C. § 3109. Other limitations may apply under statutes that provide specific authorization. See note 101, supra.

The employment of experts and consultants could be used by an agency with an irregular need for ADR services. Professionals could be brought on board in a short time, without the need for either a full-blown procurement or a competitive civil service placement. If a requirement for many services can be foreseen, but their timing is liable to be sporadic, then the employees could be hired on an intermittent basis, providing services from time to time as necessary.[106]

There are several potential impediments to hiring ADR neutrals as special government employees. These impediments may be summarized as follows:

Conflicts of Interest. Employees hired under 5 U.S.C. § 3109 are subject to all statutory prohibitions on conflicts of interest, including ethical standards, financial disclosure, and post-employment restrictions on employment.[107] To the extent that an expert or consultant becomes subject to conflict-of-interest restrictions, his professional options after serving as a neutral could be constrained. For example, a consultant employed by EPA on an intermittent basis was excluded from bidding on an EPA contract relating to her area of expertise because, at the time of the contract bidding, she was still technically an employee of EPA. This result was reached even though the consultant had not actually accepted any work for the agency for a period of time prior to bidding.[108] In a recent case, the government was enjoined from proceeding with a contract awarded to a bidder who had been an employee of the government when he bid, but who resigned prior to the award.[109]

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[106] It is possible for a professional to maintain two or more intermittent positions with different agencies. See 5 U.S.C. § 5703. The Federal Personnel Manual states that, under an exception to the general restriction against being paid for more than one position for more than 40 hours per week, "an individual is entitled to pay for services on an intermittent basis from more than one consultant or expert position, provided the pay is not received for the same hours of the same day." FPM 304-6-1.

[107] FPM 304-1-9. Temporary or interim employees who serve less than 130 days per year may qualify for treatment as a "special government employee", and thereby will not be subject to all of the prohibitions that apply to regular employees. See FPM Chapter 735.

[108] Matter of Enarco, Inc., B-218106, 85-1 CPD ¶ 592 (May 23, 1985).

[109] Speakman Co. v. Weinberger, (unpublished, D.D.C.), CCH Government Contracts Reports ¶ 74,539 (October 2, 1986).

Pay Limitations. Compensation for experts and consultants who are hired under Section 3109 is limited to the rate of pay for level V of the Executive Service. The daily rate may therefore be considerably less than a highly qualified neutral could command in the commercial market. Moreover, specific authorizing statutes for some agencies limit the compensation for temporary experts and consultants to very low levels; for example, the rate of compensation for Department of Agriculture experts is limited to $50 per day.[110] Thus, some qualified potential ADR neutrals may be unwilling to offer their services to government agencies if their compensation is limited to an arbitrarily low level.

Requirement to Follow Procurement Procedures. As noted above, hiring a neutral through Section 3109 obviates competitive civil service requirements. Section 3109 also exempts such hirings from the requirements of 41 U.S.C. § 5, which requires that all procurements of contracts for supplies or services in excess of $10,000 be publically advertised. However, the Comptroller General has held that this exemption

> does not relieve an agency from the necessity of satisfying all of the other applicable requirements imposed by the Federal Property and Administrative Services Act of 1949 . . . and the Federal Procurement Regulations . . . on Government contracts for goods or nonpersonal services.[111]

Thus, it is not at all clear that hiring ADR neutrals as special government employees is any more efficient than utilizing procurement techniques discussed above.

### e. Innovations in Procedures

Contracting for services for multiple proceedings (especially in the case of indefinite quantity contracts) can encounter procedural requirements in the Federal Acquisition Regulation that simply do not conform to the needs of the agencies. Subpart 1.4

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[110] 7 U.S.C. § 1642.

[111] 61 Comp. Gen. 69, 78 (1981) (citations omitted).

of FAR contains the kernel that may provide the solution to this situation:[112]

> Unless precluded by law, executive order, or regulation, deviations from the FAR may be granted as specified in this subpart when necessary to meet the specified needs and requirements of each agency. The development and testing of new techiques and methods of acquisition should not be stifled simply because such action would require a FAR deviation. The fact that deviation authority is required should not, of itself, deter agencies in their development and testing of new techniques and acquisition methods . . . .[113]

While statutory requirements cannot be waived, the FAR itself points the way toward its own adjustment. Many specifications for contract devices, such as supply schedules and indefinite quantity contracts, were not established by statute, but rather developed over the years largely through experience and adjudication; it is these structural devices that are susceptible of modification.

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[112] 48 C.F.R. § 1.402.

[113] Revisions to the Federal Acquisition Regulations are prepared and issued through the coordinated action of the Civilian Agency Acquisition Council (composed of representatives of the civilian executive departments and EPA, the Small Business Administration, and the Veterans Administration) and the Defense Acquisition Regulatory Council (representatives of military departments, the Defense Logistics Agency, and NASA). 48 C.F.R. § 1.201-1. Notice and comment rulemaking is used when the revision is "significant". 48 C.F.R. § 1.501.2.

Deviations from the FAR are permitted "when necessary to meet the specific needs and requirements" of an agency, and require authorization by specified agency officials. 48 C.F.R. § 1.402. Deviations for a single contracting action require the agency head or a delegee to authorize the deviation and to furnish the FAR Secretariat with a copy of the authorization. 48 C.F.R. § 1.403. Deviations for a class of civilian contracting actions require that the appropriate agency official first consult with the Civilian Agency Acquisition Council. 48 C.F.R. § 1.404(a)(1). When an agency perceives the need for a class deviation on a permanent basis, the agency must submit a proposed FAR revision to the FAR Secretariat for consideration by the pertinent FAR Council(s). 48 C.F.R. § 1.404(a)(2). Deviations for defense agencies and NASA are subject to slightly different requirements.

### 5. Use of Government Neutrals

Using employees of the federal government as neutrals has several advantages. First, assuming the immediate availability of a qualified government neutral, the delays inherent in the procurement process described above may be avoided. Second, using government employees presumably spares the government the additional expense of paying outside neutrals.[114] Third, to the extent that the use of private parties as "neutrals" creates constitutional issues under the "delegation doctrine" (See § IV infra), those issues are presumably avoided, or at least substantially reduced, when government employees perform the neutral function. Finally, there may be a long-term advantage to the extent that as government employees become expert in acting as neutral advisors, arbitrators, or convenors/facilitators, the process of institutionalizing ADR and regulatory negotiation within the government will be enhanced.

Potential limitations on the use of government employees as neutrals are: first, private parties to disputes may not view government employees as truly neutral; and second, the most logical providers of neutral services, such as FMCS and CRS, may be inhibited by their statutory charter[115] and/or manpower limitations from providing such services on a regular basis.

## E. Long-Term Structural Issues

As discussed above, use of state-of-the-art ADR techniques and regulatory negotiation by federal agencies is still in an experimental or formative stage. The experience of agencies is limited, and many agencies are sensitive to potential political criticism of their use of newly developed negotiation techniques.

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[114] However, an agency may be required to compensate the FMCS, for example, for the services of one of its mediators through an inter-agency transfer of funds. See 31 U.S.C. § 1535. Some have argued that if one considers the fully allocated cost of a government employee's time, including salary and overhead, use of a government neutral may be more costly than contracting with an outsider.

[115] FMCS is authorized to conciliate labor disputes (29 U.S.C. § 173), while the CRS is charged with mediating community disputes relating to discrimination on the basis of race, color, or national origin. As in the past, FMCS or CRS could in effect loan an employee to another agency for a limited period to assist in an ADR or reg neg proceeding. See discussion in Section III.C.4 above. But the agencies' statutory charters would probably prevent them from establishing an ongoing ADR neutrals services for other federal agencies without specific congressional authorization.

The dilemma created by these factors is that the growth of these ADR techniques and regulatory negotiation may be limited by the shortage of experienced neutrals in the private sector; if agencies do not expand their use of such techniques, however, the pool of experienced neutrals cannot expand.

Thus, agencies must respond to the long-term need to develop a broader base of expertise upon which to draw for neutral services. Expansion of the talent pool could occur through several processes:

Less stringent criteria for selection. The Corps of Engineers has conceded that it is more sensitive about the selection of neutral advisors for its minitrials during the developmental stage, when the process is potentially subject to greater scrutiny by higher officials in the agency and/or Congress. As the program gains acceptance over time and becomes more part of the Corps' routine procedures, its visibility will be reduced. At that point, the Corps believes it may loosen its criteria for selection to broaden the base of available neutrals.

Training mechanisms. The proposal submitted by NIDR on the EOP/CEQ regulatory negotiation procurement provided that each negotiation would be staffed by at least two convening/facilitating professionals. One purpose of this staffing was to allow the senior professional to train his colleague in the process, thus giving the junior professional the experience needed to perform convening or facilitating services for future regulatory negotiations. While such a "team" approach may involve some short-term costs, it may be beneficial in the long run in developing a broader cadre of trained professionals available to the agencies.

Government neutrals. Both the FMCS and CRS were created in response to a specific need for mediation services within the government. By expanding the authority of FMCS, CRS, or other agencies, or creating a new "neutrals" service organization within the government, agencies' ability to expand their use of ADR and regulatory negotiation techniques would be enhanced.[116]

Government Roster of Neutrals. Another device for expanding the availability of qualified neutrals would be to assign a single agency, such as ACUS, to maintain a roster of qualified neutrals from which other agencies could draw. Private individuals and organizations who wished to be listed on the roster would submit applications specifying educational background, experience, and techical expertise, if any. The central agency could also collect feedback on those neutrals who were actually employeed by agencies for ADR or regulatory negotiation. The establishment and maintenance of such a roster could be patterned after the Roster of Arbitrators maintained by FMCS for use in voluntary arbitrations of disputes arising under labor collective bargaining agreements.[117]

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[116] The National Institute for Dispute Resolution has a program for providing moderate grants to educational institutions and state governments to establish dispute resolution programs. Such "seed money" may be available to federal agencies that are interested in establishing pilot programs or policy guidelines for the use of ADR or regulatory negotiation.

## IV.

## DELEGATION ISSUES

A recurring issue with respect to federal government use of ADR techniques is whether the functions performed by private neutrals are unconstitutional under the "delegation" doctrine.[118] "Delegation" actually encompasses a number of different constitutional concepts, including violations of due process, delegation of legislative power, and violation of the Appointments Clause.[119]

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[117] 29 C.F.R. Part 1404.

[118] See Memorandum for Stephen J. Markman, Assistant Attorney General, Office of Legal Policy, "Administrative Conference Recommendation on Federal Agencies' Use of Alternative Dispute Resolution Techniques" (May 24, 1986).

[119] In addition, OMB Circular A-76, Performance of Commercial Activities, August 16, 1983, prohibits award of any contract "for the performance of an inherently governmental function." The Circular defines "governmental function" as follows:

> (1) The act of governing; i.e., the discretionary exercise of Government authority. Examples include criminal investigations, prosecutions and other judicial functions; management of Government programs requiring value judgments, as in direction of the national defense; management and direction of the Armed Services; activities performed exclusively by military personnel who are subject to deployment in a combat, combat support or combat service support role; conduct of foreign relations; selection of program priorities; direction of Federal employees; regulation of the use of space, oceans, navigable rivers and other natural resources; direction of intelligence and counter-

(Footnote continued)

Due Process. In a line of cases dating back to the Depression era, the Supreme Court struck down legislative delegations of public decisionmaking authority to private entities on the ground that such delegations violated due process.[120] In each of these cases, the principal due process objection was that the power to regulate a group of private parties was delegated to a subgroup of such parties who had an interest in the result of the regulation. For example, in Carter v. Carter Coal Company[121] the Court was reviewing the Bituminous Coal Conservation Act of 1935. The Act established a national bituminous coal commission and divided the country into districts. Within each district, the majority of producers and miners were authorized to fix maximum hours of labor and minimum wages that were binding upon all producers and miners within the district. The Supreme Court held that this was an unconstitutional violation of due process, stating as follows:

> The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.[122]

Other infirmities in the private delegations found unconstitutional by the due process line of cases are the lack of any specified standards for decision by the private parties, and the lack of any review by a government agency or court.

Delegation of legislative power. The principal case in this line of authority is A.L.A. Schecter Poultry Corp. v. United States.[123] Schecter struck down portions of the National Recovery Act as unconstitutional delegations of legislative power. In particular, Section 3 of the Act delegated to private parties and the President the power to enact codes of fair competition

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[119] (continued) intelligence operations; and regulation of industry and commerce, including food and drugs.

[120] Carter v. Carter Coal Company, 298 U.S. 238 (1938); Seattle Title Trust Co. v. Roberge, 226 U.S. 1 (1928); Eubank v. City of Richmond, 226 U.S. 137 (1912).

[121] 298 U.S. 238 (1935).

[122] Id., 298 U.S. at 311.

[123] 295 U.S. 495, 537 (1935).

that were enforceable by injunction and punishable as crimes. The Court held that this "unfettered" delegation of legislative power was an unconstitutional violation of the separation of powers doctrine.

Appointments Clause. In this line of cases, the Court has nullified delegations of decisionmaking authority to private parties on the basis that official government functions cannot be performed by persons who were not appointed by the President with the advice and consent of the Senate pursuant to Article II, section 2, clause 2 of the Constitution. In Buckley v. Valeo[124] the Court held certain provisions of the Federal Election Campaign Act of 1971 to be unconstitutional on the basis that the majority of the voting members of the Federal Election Commission were appointed by the President pro tempore of the Senate and the Speaker of the House. The Commission had authority to make rules for carrying out the Act, to enforce the Act by bringing civil actions against violators, and to temporarily disqualify federal candidates for failing to file required reports. The Court held that the delegation of such regulatory and enforcement functions to persons not appointed by the President with the advice and consent of the Senate violated the Appointments Clause.

Under these various lines of delegation cases,[125] constitutional issues should not arise with respect to the various forms of ADR that are totally nonbinding, such as minitrials and mediation. In a minitrial, for example, the neutral advisor at most presides at the hearing and acts as a mediator between the principal negotiators. In no event does he render any kind of decision that is binding on either the private party or the government. The lack of any binding decisionmaking authority thus insolates nonbinding ADR from constitutional criticism.

Similarly, there should be no constitutional issues with respect to regulatory negotiation, as structured under the ACUS recommendations. First, the convenor/facilitator is not a decisionmaker, but rather a person who identifies the issues and the interested parties, and attempts to mediate a negotiated resolution among the parties. Second, under the ACUS recommendations, the product of the regulatory negotiation is a proposed rule that is not in any way binding upon the agency.[126] At the completion of the regulatory negotiation, the proposed regulation must be published in the Federal Register and subjected to the notice-and-comment rulemaking procedures of the Administrative Procedure Act.[127]

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[124] 424 U.S. 1 (1976).

[125] See generally Liebmann, Delegation to Private Parties in American Constitutional Law, 50 Ind. L.J. 650 (1975).

[126] See R. H. Johnson & Co. v. SEC, 198 F.2d 690 (2d Cir.), cert. denied, 344 U.S. 855 (1952); United Black Fund, Inc. v. Hampton, 352 F.Supp. 898 (D.D.C. 1972).

The constitutional delegation issues arise principally with respect to neutrals who have authority to issue decisions that are binding upon the parties to a dispute. This is most likely to be an issue in the case of arbitration. Again, however, if agencies follow the details of the ACUS recommendation regarding ADR, constitutional issues should be avoided.[128] Under the ACUS recommendation, resort to arbitration is a voluntary decision of the parties, unless mandated by a statute. Thus all parties consent to the arbitration proceeding. In addition, the parties have a role in the selection of the arbitrators, thus insuring that they will be neutral and disinterested. The decision of the arbitrator is subject to judicial review under the standards of the U.S. Arbitration Act.[129] Finally, the ACUS recommendation provides that arbitration is appropriate only when the norms for decision have been established by statute, precedent, or rule.[130]

Thus, the potential due process objections to delegations of decisionmaking authority to private parties should not apply to voluntary arbitration, as structured by the ACUS recommendation. The fact that the interested parties consent to the procedure as a practical matter eliminates the potential for due process challenge. Moreover, the traditional due process objections (self-interest of the decisionmaker, lack of decisional norms, and lack of judicial review) are specifically addressed and resolved by the ACUS recommendation.

Finally, any doubts regarding whether binding arbitration complies with the due process clause are probably eliminated by the Supreme Court's decision in Schweiker v. McClure.[131] That case involved review of provisions of the Social Security Act establishing the Medicare program. The Act provided that any disputes regarding Medicare claims would be subject to mandatory arbitration by employees of private insurance carriers who had been retained to administer the program. Implementing regulations promulgated by the Department of Health and Human Services required that these private "hearing officers" be attorneys or other qualified individuals who (1) had the ability to conduct formal hearings; (2) generally understood of medical matters and terminology; and (3) possessed a thorough knowledge of the Medicare program, including the statute and regulations on which it is based.[112]

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[127] ACUS Recommendation 82-4, 1 C.F.R. § 305.82-4, ¶¶ 13-14.

[128] ACUS Recommendation 86-3, 1 C.F.R. § 305.86-3, ¶ 4.

[129] 9 U.S.C. § 10.

[130] ACUS Recommendation 86-3, 1 C.F.R. § 305.86-3, ¶ 5(a)(2).

[131] 456 U.S. 188 (1982).

The Supreme Court held that this scheme complies with due process. The Court stated that there was a presumption that the hearing officers who decided Medicare claims were unbiased. Since claims were ultimately paid by the federal government, and not their private employers, the hearing officers had no personal or financial interest in the outcome of the proceedings. In addition, the requirement that hearing officers have pertinent experience and familiarity with the Medicare program minimized the risk of an erroneous decision and the probable value of additional procedural safeguards.[113] Under *Schweiker*, therefore, mandatory arbitration schemes are constitutional under the Due Process Clause, so long as the arbitrator are disinterested and possess adequate qualifications.[114]

Nor should binding arbitration, as defined in the ACUS recommendation, involve unconstitutional delegation of legislative power or violation of the Appointments Clause. Recommendation 86-3 makes it clear that binding arbitration is inappropriate where the norms for decision are not established by statute, regulation, or precedent.[115] Thus, arbitrators will in no event be making policy decisions, but rather will be applying existing decisional standards to the facts of a particular dispute. Certainly, an arbitrator's award cannot be fairly analogized to the codes of fair competition that were struck down in the *Schecter Poultry* case; in that case, the codes established norms for behavior by private parties that were enforceable through injunctions or criminal actions. An arbitrator's award simply resolves a fact-specific dispute between a private party and the government, or among private parties.

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[112] *Id.*, 456 U.S. at 199.

[113] *Id.*, 456 U.S. at 198-99. *See also* Thomas v. Union Carbide Agricultural Products Co., ____ U.S. ____, 105 S. Ct. 3325 (1985) (Upholding binding arbitration provisions of the FIFRA).

[114] A specific statutory mandate does not appear necessary for the delegation of decisionmaking authority by an agency. *See* Tabor v. Joint Board for the Enrollment of Actuaries, 566 F.2d 705, 708 (D.C. Cir. 1977).

[115] ACUS Recommendation 86-3, 1 C.F.R. § 305.86-3, ¶ 5(a)(2).

Finally, arbitrators do not have the authority to promulgate or enforce regulations, as did the Federal Electoral Commission in Buckley v. Valeo.[116] Thus, the Appointments Clause should not stand in the way of agencies' employing arbitration under the ACUS recommendation.

## V.

## CONCLUSIONS

The challenges facing federal agencies in expanding the use of ADR and regulatory negotiations include developing and refining procurement procedures that will streamline the process of hiring outside neutrals, and developing a broader base from which to draw in acquiring the services of private or government neutrals. Meeting this challenge will require that agencies be flexible in defining the qualifications required of outside neutrals, avoiding rigid requirements of technical expertise or specific ADR experience unless such qualities are essential to the success of the proceedings. Agencies would also benefit from efforts to pool information about their experience with ADR neutrals, ideally with the advice and assistance of agencies like ACUS and FMCS. Advantage should be taken of opportunities to train government personnel in ADR skills, and to utilize the expertise of existing dispute resolution services within the government. Finally, agencies should use existing procurement techniques in imaginative ways, and seek to develop new techniques, so that the services of qualified ADR neutrals can be acquired without the delays and procedural hurdles inherent in the normal competitive procurement process.

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[116] In the specific context of government contracts disputes, an issue has been raised as to whether binding arbitration would violate the requirements of the Contract Disputes Act of 1978, 41 U.S.C. § 601 et seq. (1982). That Act expressly authorizes agency boards of contract appeals or the U.S. Claims Court to hear and decide appeals arising out of disputes between government contractors and federal agencies. Arguably, the Contracts Disputes Act would pose a barrier to the use of arbitration in government contracts disputes unless the Act were specifically amended to permit arbitration.

COMMERCE BUSINESS DAILY Monday, January 26, 1987

**Environmental Protection Agency, Procurement Operations Branch, (PM–214F), 401 M St., SW, Washington, DC 20460, Attn: Michael Travis, Contracting Officer, 202/382–3211**

**H–SUPPORT SERVICES FOR REGULATORY NEGOTIATION AND OTHER CONSULTATIVE PROCESSES** The EPA has a requirement for contractor support in convening, facilitating, documenting, and training, as well as related resource, analytic, and direct support for the regulatory negotiation process. A fixed–rate, indefinity qty contr is planned with a 12 month base period and two 12–month option periods. Copies of the RFP will be avail to prospective offerors o/a 2 Feb 87. Requests must be submitted in writing. Tel requests will not be honored. RFP WA87–A058. See Note 57. (021)

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COMMERCE BUSINESS DAILY Thursday, September 18, 1986

**US Dept of the Interior, Office of Surface Mining, Reclamation & Enforcement, Washington, DC 20240**

**H–PLANNING, CONVENING, AND FACILITATING RULEMAKING WORKSHOPS AND THE CONDUCT OF INFORMAL AND FORMAL MEETINGS** with Osmre's diverse affected constituency in the areas of rulemaking outreach, facilitated and negotiated rulemaking. The govt may award a contract on the basis of initial offers received, without discussions (FAR 52.215–16(c)). Req must be in writing. Tel req will not be honored. Subject to the availability of FY87 funding. Sol 01–87 (JEP), due thirty days after publication. POC Marie Chavis. (258)

Page 1

68-W4-0001

AWARD/CONTRACT

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1. CERTIFIED FOR NATIONAL DEFENSE UNDER BDSA REG. 2. AND/OR DMS REG. 1
1. RATING

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2. CONTRACT NO.
68-W4-0001

3. EFFECTIVE DATE
3/22/94

4 REQUISITION/PROJECT NO.
W201430-A2

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5. ISSUED BY Code:

Environmental Protection Agency
Procurement Operations Br. (3803F)
401 M St. SW
Washington, DC 20460

6. ADMINISTERED BY Code
(If other than Item 5)

---

7. NAME AND ADDRESS OF CONTRACTOR
RESOLVE, INC.
1250 24TH STREET, NW
SUITE #500
1250 24th St., N.W.
WASHINGTON, DC 20037
Code: Facility:

8. DELIVERY,
☐ FOB ORIGIN
☒ OTHER (See below)

9. DISCOUNT FOR PROMPT PAYMENT
N/A

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10. SUBMIT INVOICES (4 copies unless otherwise specified) TO THE ADDRESS SHOWN IN ITEM: 12

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11. SHIP TO/MARK FOR Code:

If applicable,
see Section D
of the Schedule

12. PAYMENT WILL BE MADE BY
Code:
Environmental Protection Agency
Research Triangle Park Financial
Management Center (Mail Code MD-32)
Research Triangle Park, NC 27711

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13. AUTHORITY FOR USING OTHER THAN FULL AND OPEN COMPETITION
☐ 10 U.S.C. 2304(c)( ) ☐ 41 U.S.C. 253 (c) ( )

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14. ACCOUNTING AND APPROPRIATION DATA
See accounting and appropriation data in Section B.

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| 15A. ITEM NO. | 15B. SUPPLIES/ SERVICES | 15C. QUANTITY | 15D. UNIT | 15E. UNIT PRICE | 15F AMOUNT |
|---|---|---|---|---|---|
| | DISPUTE RESOLUTION SUPPORT SERVICES FOR REGULATORY NEGOTIATION AND OTHER CONSULTATIVE ACTIVITIES | | | | |

TOTAL CONTRACT AMOUNT: $5,417,746.20

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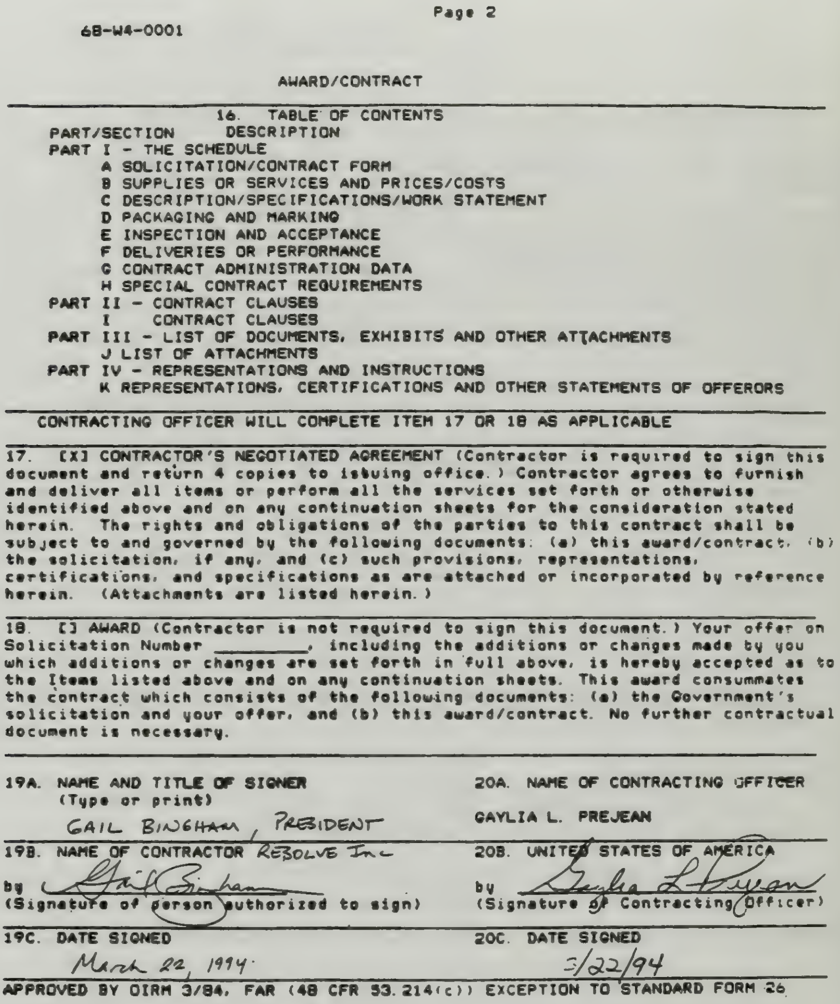
APPROVED BY OIRM 3/84. FAR (48 CFR 53.214(c)) EXCEPTION TO STANDARD FORM 26



Page 2

68-W4-0001

AWARD/CONTRACT

16. TABLE OF CONTENTS

PART/SECTION DESCRIPTION

PART I - THE SCHEDULE
  A SOLICITATION/CONTRACT FORM
  B SUPPLIES OR SERVICES AND PRICES/COSTS
  C DESCRIPTION/SPECIFICATIONS/WORK STATEMENT
  D PACKAGING AND MARKING
  E INSPECTION AND ACCEPTANCE
  F DELIVERIES OR PERFORMANCE
  G CONTRACT ADMINISTRATION DATA
  H SPECIAL CONTRACT REQUIREMENTS
PART II - CONTRACT CLAUSES
  I CONTRACT CLAUSES
PART III - LIST OF DOCUMENTS, EXHIBITS AND OTHER ATTACHMENTS
  J LIST OF ATTACHMENTS
PART IV - REPRESENTATIONS AND INSTRUCTIONS
  K REPRESENTATIONS, CERTIFICATIONS AND OTHER STATEMENTS OF OFFERORS

CONTRACTING OFFICER WILL COMPLETE ITEM 17 OR 18 AS APPLICABLE

17. [X] CONTRACTOR'S NEGOTIATED AGREEMENT (Contractor is required to sign this document and return 4 copies to issuing office.) Contractor agrees to furnish and deliver all items or perform all the services set forth or otherwise identified above and on any continuation sheets for the consideration stated herein. The rights and obligations of the parties to this contract shall be subject to and governed by the following documents: (a) this award/contract, (b) the solicitation, if any, and (c) such provisions, representations, certifications, and specifications as are attached or incorporated by reference herein. (Attachments are listed herein.)

18. [ ] AWARD (Contractor is not required to sign this document.) Your offer on Solicitation Number ________, including the additions or changes made by you which additions or changes are set forth in full above, is hereby accepted as to the Items listed above and on any continuation sheets. This award consummates the contract which consists of the following documents: (a) the Government's solicitation and your offer, and (b) this award/contract. No further contractual document is necessary.

| | |
|---|---|
| 19A. NAME AND TITLE OF SIGNER (Type or print)<br>GAIL BINGHAM, PRESIDENT | 20A. NAME OF CONTRACTING OFFICER<br>GAYLIA L. PREJEAN |
| 19B. NAME OF CONTRACTOR RESOLVE Inc<br>by Gail Bingham<br>(Signature of person authorized to sign) | 20B. UNITED STATES OF AMERICA<br>by Gaylia L Prejean<br>(Signature of Contracting Officer) |
| 19C. DATE SIGNED<br>March 22, 1994. | 20C. DATE SIGNED<br>3/22/94 |

APPROVED BY OIRM 3/84, FAR (48 CFR 53.214(c)) EXCEPTION TO STANDARD FORM 26

## C 2 STATEMENT OF WORK--CONTRACT WHERE WORK IS ORDERED BY WORK ASSIGNMENTS OR DELIVERY ORDERS (EP52.210-110) (APR 1984)

The Contractor shall furnish the necessary personnel, material, equipment, services and facilities (except as otherwise specified), to perform the Statement of Work/Specifications specified below. The contractor shall not occupy or work for extended periods of time in EPA space. THE CONTRACTOR SHALL NOT INTERPRET EPA POLICY ON BEHALF OF EPA NOR MAKE DECISIONS ON ITEMS OF POLICY, REGULATION OR STATUTE. THE CONTRACTOR SHALL NOT TAKE A STAND ON THE MERITS OF SUBSTANTIVE ITEMS UNDER DISCUSSION.

The Contractor shall perform work under this contract only as directed in delivery orders issued by the authorized ordering officers.

### C.2.1 BACKGROUND AND OBJECTIVES:

### 1. BACKGROUND

### a. CONSENSUS AND DISPUTE RESOLUTION PROGRAM

The Consensus and Dispute Resolution (CDR) Program (formerly the Regulatory Negotiation Project) of the Office of Policy, Planning and Evaluation provides management of contractor support for Alternative Dispute Resolution (ADR) and collaborative problem solving activities conducted by both Headquarters and Regional offices of the Environmental Protection Agency. In addition to management of contract support, the Program assists all EPA program and regional offices in the initial selection and design of dispute resolution, collaborative problem solving and consensus building processes in all types of disputes involving the Agency except enforcement disputes. The CDR Program provides ongoing staff support for national regulatory negotiations and policy dialogues.

The CDR Program provides management of contract resources for the use of ADR proceedings in enforcement, compliance and permitting cases for the Office of Enforcement and all of EPA's Regional Offices.

The ADR Coordinator for purposes of the Administrative Dispute Resolution Act is the Assistant Administrator for Enforcement. Staff of the Assistant Administrator provide overall policy coordination for EPA dispute resolution activities and serve as the primary liaison for all ADR activities within the Office of Enforcement. Regional office case attorneys provide case specific supervision of ADR activities on their own cases. At the present time EPA does not have ADR coordinators in each regional office.

Over the past four years during the performance of prior contracts, approximately one third of the contractual effort was directed toward long term regulatory negotiations and policy dialogues, one third to short term collaborative problem solving workshops and meetings, and one third to case specific dispute resolution and ADR training seminars.

The Environmental Protection Agency's Consensus and Dispute Resolution Program and the Office of Enforcement's ADR program are further described in the Attachments A & H.

### b. LONG TERM REGULATORY NEGOTIATION AND DIALOGUES

In early 1983, the Environmental Protection Agency began the Regulatory Negotiation Project to study the usefulness of all-party, face-to-face negotiations as a supplement to the informal notice and comment process of regulatory development.

The concept of regulatory negotiation was developed, in part, from other existing models for negotiation. Many building codes, electrical and plumbing standards, and product safety measures are developed through a process of negotiation among affected parties. Negotiations take place in settling lawsuits which challenge regulations. In environmental affairs, the use of negotiation and mediation to resolve regulatory and enforcement conflicts involving government agencies has continued to increase.

Negotiation, formal or informal, is a process that gives parties far greater input into decision-making. Parties with different interests can resolve issues by meeting, discussing, and agreeing on facts, questions, and solutions. Encouraging parties to share information and work together provides a more solid base of agreed-on facts and fosters more creative approaches to resolving issues and reaching consensus.

Regulations are typically developed by informal notice and comment, as specified in the Administrative Procedure Act. This tends to be an adversarial process. An agency develops facts and policy, solicits comments from interested parties, and proposes a rule. The agency then analyzes the comments and issues a final rule. When this system fails to accommodate competing interests, the result is some form of conflict, frequently litigation. As many as 80% of an agency's regulations are challenged in court. The amount of time and resources involved in this effort are enormous; each year these cases require approximately 50 work-years of EPA legal support, 75 work years of Department of Justice support, and 175 workyears of time for plaintiff's counsel.

Continuing evaluation of the use of regulatory negotiation shows that it offers an innovative opportunity to explore how to (1) use Agency time and resources and those of interested parties more effectively, (2) involve the public more fully and openly, to produce better regulations, and (3) reduce litigation and uncertainty.

The goal for each regulatory negotiation is to reach a consensus upon which to base a Notice of Proposed Rulemaking. This consensus is used to the extent feasible under Federal law as the basis for the proposal. An independent third party--the facilitator--chairs the negotiations, keeps the process moving smoothly, and assists in resolving disputes

Negotiations occur at the pre-proposal stage and are conducted under Federally chartered Advisory Committees. A senior official of the program office responsible for the regulation acts as EPA's chief negotiator and party-at-interest. Parties representing legitimate and definable interests in the regulated community, environmental groups, and other affected stakeholders negotiate on behalf of their constituencies. Once a regulation is proposed, all normal Administrative Procedure Act, 5 U.S.C. 551-553, requirements apply.

National policy dialogues are similar to regulatory negotiations in many respects including the numbers and distribution of parties, and scope of issues. However, the goal of a dialogue is not to draft regulatory language. Typical goals may involve reaching a joint understanding of existing data and data gaps, or conducting an examination of the practical effects of certain policies pr regulations. Some dialogues are formally chartered Advisory Committees with resonsibility to make a collective recommendation to the Agency; some dialogues are primarily for the purpose of information, data and/or opinion exchange.

EPA has conducted twelve regulatory negotiations and more than ten national policy dialogues.

### c. SHORT TERM COLLABORATIVE AND CONSULTATIVE APPROACHES

In 1986, the Regulatory Negotiation Project (now the Consensus and Dispute Resolution Program) expanded both its inhouse consultation role and its contracting availability to include other shorter term collaborative problem solving and consensus building processes for resolving regulatory and policy issues. These processes encompass less formal, shorter term models for collaborative input into decision-making than the Advisory Committees of negotiated rule making and policy dialogues, and include such activities as facilitated public meetings, workshops, forums and roundtables.

These activities may consist of a single meeting or a series of related meetings. They may involve a small group specially selected for particular expertise or may involve a large, very diverse group The purpose may vary from a chance to air differences, to information and data exchange, to generation of alternatives and options. Some of the skills expected of a dispute resolution professional in these activities are the ability to: construct a negotiated agenda, design an effective meeting format, manage logistics, diffuse or manage controversy, and accurately summarize information.

Common to all of the short term processes is a collaborative approach that seeks to foster an early exchange of information among affected interests so as to lead to greater communication and collaboration.

### d. ALTERNATE DISPUTE RESOLUTION PROCEEDINGS IN ENFORCEMENT

In 1988 EPA began a pilot project in Region V to use mediated settlement negotiations and mediated fact finding to resolve some enforcement cases under the Comprehensive Environmental Response, Compensation and Liability Act (Superfund). The pilot proved to be successful and efforts to expand it further in Region V and to establish the program in other Regions are underway. In addition, there has been increased interest in using ADR to resolve cases under other environmental statutes such as Resource Conservation and Recovery Act and the Clean Water Act.

### e. TRAINING AND RESEARCH

The Consensus and Dispute Resolution Program also encourages and sponsors training in negotiation and other dispute resolution and consultative processes for Agency management and staff and for participants in regulatory negotiations and policy dialogues. Past training courses have included collaborative decision making for EPA workgroup chairs, ADR orientation for headquarters and regional enforcement personnel and principled negotiation orientation for regulatory negotiation committees.

In addition, the Program sponsors research into the feasibility, effectiveness, costs and benefits of using specific dispute resolution or consultative processes to solve particular environmental regulatory, policy or enforcement matters. Past research has included a pilot program for use of mediation in Superfund cases, detailed case studies of the use of mediation in EPA enforcement cases, a survey of the use of consensus based processes throughout the Agency, and a study of public interest group attitudes and needs regarding regulatory negotiation.

### f. FUTURE ADR APPLICATIONS AT EPA

The Environmental Protection Agency is in the process of writing its ADR policy as required by the Administrative Dispute Resolution Act. In the course of developing this policy, decisions will be made as to the use of ADR in other areas of the Agency's responsibility such as procurement disputes, grants and assistance disputes, personnel disputes. Full application of ADR processes to these areas is likely to involve a pilot program and evaluation. The conduct of such pilots and implementation of of some or all recommendations based on the pilots are likely to be the subject of one or more delivery orders on this contract. Brief descriptions of disputes common to EPA follow.

(1) Permit Disputes

Permit disputes arise in several phases of the facility and site permitting process: permit issuance, permit modification, permit compliance. Disputants are primarily the EPA, state or local agencies, and the permit holder or applicant Some permits are very difficult to negotiate successfully. In addition many permits that are negotiated successfully may also become the subject of disputes with surrounding communities or public interest groups. Such disputes can delay issuance, modification or settlement of permits for significant periods of time which cost permit holders or applicants thousands of dollars, the agencies hundreds of workhours, and the public valuable time.

(2) Siting Disputes

The siting of locally unwanted land uses (LULUs) is subject to a phenomenon called "not in my back yard" or NIMBY. LULUs may include solid waste transfer stations, solid waste or hazardous waste treatment, storage or disposal facilities, manufacturing facilites, etc. Delays due to community acceptance of these facilities is common. Planning and information exchange between the entity proposing the facility and the local community is often non-existent, untimely or unresponsive often resulting in significant delays and misunderstandings. EPA may become aware of or brought into some of these disputes by any of the parties to the dispute.

(3) Grants and Assistance Disputes

EPA provides grants and assistance to state and local governments under a number of environmental laws. Disputes arise regarding the proper expenditure and timing of the use of these funds both during and after the projects are completed. Negotiations between governments (national, state, local, etc.) are sometimes difficult to resolve because they involve public officials and the expenditure of public funds.

2. OBJECTIVES

The objective of this contract is to obtain contractor support services in convening, facilitating and evaluating regulatory negotiations, policy dialogues, workshops and other dispute resolution and collaborative problem solving processes in the aforementioned areas. In addition, contractor support will include conducting alternate dispute resolution proceedings (for instance mediation, arbitration) for site or facility specific cases such as enforcement, compliance and permitting disputes.

Dispute resolution services for other types of disputes that may be covered by EPA's ADR policy such as grants and assistance agreement disputes may also be provided by this contract. The contractor will also provide training of government employees in negotiation skills, collaborative problem solving, facilitation, mediation, arbitration, and other alternate dispute resolution proceedings.

## C.3 WORK STATEMENT

### A. LONG TERM PROCEEDINGS - REGULATORY AND POLICY MATTERS

Regulatory negotiations and policy dialogues occur in two stages, the first stage is an evaluation of the feasibility and advisablity of conducting the negotiation or convening, the second stage is actually conducting the negotiation.

### 1. CONVENING

The process of evaluating the use of dispute resolution or consultative processes for a particular issue is called convening. Regulatory negotiations, policy dialogues and other consultative processes require careful evaluation prior to proceeding. Both the potential subject matter and the potential participants must be evaluated carefully. For regulatory negotiations, EPA has set forth criteria (Attachment B) for both the subject of the negotiation and for the selection of parties. These criteria, based on negotiation theory, are also useful in evaluating the issues and parties for less formal dialogue and consultative processes.

The Contractor shall assist in convening regulatory negotiations, policy dialogues, workshops and other consultative processes.

Tasks performed by the contractor may include:

- Selecting appropriate dispute resolution professional or team, taking into account knowledge of the subject, conflicts of interest, availability, experience in the particular ADR procedure and any other selection criteria that may be specified in the Delivery Order. Choice of dispute resolution professional shall be approved by the EPA Project Officer (PO), Delivery Order Project Officer (DOPO).

- Meeting with the EPA PO, DOPO, and program office coordinator to discuss in greater detail the procedural and technical issues.

- Assisting the EPA PO, DOPO and program office coordinator in developing a list of potential participants and identifying a tentative set of issues to be addressed.

- In consultation with the EPA PO, DOPO, and program office staff, assist in preparing and distributing background information on procedural and technical aspects and issues to potential participants in a dialogue or negotiation under exploration

- Contacting potential parties to discuss their possible participation in a particular negotiation or other consultative process. The dispute resolution professional shall discuss the opinions, positions and needs of each party with regard to the issues involved including both the procedural & substantive technical aspects of the process. Each party shall be asked to suggest additional groups that should be contacted to ensure that the candidate pool for participation is comprehensive. Each party shall be asked to identify the issues that should be covered in the chosen consultative process.

- If initial interviews with the key participants reveal that a consultative process (regulatory negotiation, policy dialogue, workshop series) is not feasible, the contractor shall notify the EPA PO, and DOPO, explain the difficulties (lack of interest, unequivocal opposition of a key party, disagreement about the definition of the problem, wrong forum or process, etc.) and await further EPA guidance on whether to proceed to interview all potential participants.

- Providing verbal reports weekly to the program office EPA PO, & DOPO on the general progress of the convening effort, participating in Agency briefings as requested to provide information on the progress of the convening effort.

- If a meeting appears appropriate to the EPA PO, DOPO and program office coordinator and the parties, contacting potential participants to arrange scoping or organizational meetings and presiding, along with EPA personnel, at any scoping or organizational meetings. The primary purpose of a scoping meeting shall be to make a preliminary determination if parties are interested in the process. The primary purpose of an organizational meeting shall be to determine if negotiations or a dialogue should proceed, and if so, to set the discussion agenda and timetable for subsequent meetings and to answer any remaining questions regarding the process

- Handling all logistics of arranging meetings for participants; this includes scheduling, arranging facilities and notifying participants either verbally or in writing depending on the timeframe involved.

- Preparing draft summaries or minutes of each meeting and distributing them to the participants for their approval; distributing final summaries or minutes after comments have been reviewed and incorporated; and

- Provide a convening report to the EPA PO, DOPO, and program office coordinator. Summarize the results of convening discussions including such things as discussions of the chances of a successful regulatory negotiation (policy dialogue, workshop series), recommendation of potential parties at the table, discussion of issues which will bring parties to the table, and issues which the parties cannot negotiate. Discussions should utilize as a guideline EPA's Selection Criteria for Regulatory Negotiations.

- If a regulatory negotiation (policy dialogue, workshop series) appears to be feasible, propose a design in the convening report for the process including such things as number, length, location and frequency of meetings, recommendation of potential participants whom EPA should invite, information or research necessary prior to or during the negotiation (dialogue, workshop series), and estimated resources (EPA and facilitation) recommended for the success of the negotiation (dialogue, workshop series).

b. NEGOTIATION PRELIMINARIES

If the convening report concludes that a consultative process is feasible and EPA decides to proceed:

- Assist EPA in contacting potential parties to obtain commitments to participate in the negotiation (dialogue, workshop series).

- If a consultative process seems likely, proposing tentative ground rules or operating procedures for participants, and fixing a timetable for phases of work in facilitated dialogues and negotiations.

- Arrange an initial organizational meeting of the parties to discuss the issues involved in revising the regulation (policy etc.), to get public commitments to go forward from each of the parties, and to discuss ground rules for the process.

- Provide meeting management support for this initial meeting, including such activities as meeting arrangements and recording of minutes.

- Provide assistance and materials in conducting an orientation or training for committee members in the consensus-building process prior to the negotiation.

c. FACILITATION/ MEDIATION OF NEGOTIATIONS

Many negotiation, dispute resolution and consultative approaches to regulatory processes and decision-making require a facilitator or mediator during the discussion and bargaining sessions. The facilitator/mediator keeps the parties talking, listening, and moving--as much as possible--towards consensus.

THE FACILITATOR/MEDIATOR SHALL NOT TAKE A POSITION ON THE MERITS OR RECOMMEND TO THE PARTIES WHAT THE SUBSTANTIVE RESOLUTION OF AN ISSUE SHOULD BE. The facilitator/mediator shall provide staff support (mediators, clerical and direct support, etc.) as necessary to the task who are experienced in managing, recording and summarizing meetings.

Tasks may include the following:

- Selecting appropriate dispute resolution professional or team, taking into account knowledge of the subject, conflicts of interest, availability; experience in the particular ADR procedure and any other selection criteria that may be specified in the Delivery Order. Choice of dispute resolution professional(s) shall be approved by the EPA Project Officer (PO), Delivery Order Project Officer (DOPO) and program office coordinator.

- Assistance/support of the convenor (if different than the facilitator/mediator) by drawing on the rapport established in the convening phase. This support may include sharing with the facilitator all relevant perceptions, concerns and other details gathered during the convening phase.

- Chairing all plenary sessions of negotiations or dialogue. The facilitator shall assist participants in articulating their interests, identifying areas of agreement, and developing consensus solutions to the problems that divide them.

- At the initial meetings, assisting the group on reaching consensus on the ground rules for negotiations or dialogue and refining and distributing written protocols reflecting this consensus.

- Facilitating meetings of work groups (self-selected subgroups of the plenary group which address subsets of the issues) and, if several work groups meet simultaneously providing additional facilitators or support staff to assist other work groups, if the project staff determines it useful

- Handling all logistics of arranging meetings for participants — this includes scheduling, arranging facilities and notifying participants.
- Preparing summaries or minutes of each meeting and distributing them to the participants for their review and comment.
- Communicating with participants between meetings, as needed, to ensure that issues and concerns have been communicated accurately and that participants are adequately prepared for the next meeting.
- Assistance in settling disputes during implementation of the agreement or settlement.

## 2. SHORT TERM COLLABORATIVE PROBLEM SOLVING PROCEEDINGS

EPA conducts a significant number of shorter term collaborative problem solving and consensus building processes for discussing and potentially resolving regulatory and policy issues. These processes encompass less formal, shorter term models for decision-making than the Advisory Committees of negotiated rule making, and may include such proceedings as: public meetings, technical conferences, facilitated workshops, forums and roundtables. The proceedings may involve a larger number of parties, and either a more diffuse or a more focused set of issues. The goal is usually not to reach a full consensus on the issues but to build upon existing consensus and to narrow the areas of disagreement. Common to all of these processes is a consensual approach that seeks to foster an early exchange of information among affected interests so as to give input to EPA that will lead to basic regulatory and policy decisions that have the support of affected parties.

Tasks performed by the contractor may include the following:

- Selecting appropriate dispute resolution professional or team, taking into account knowledge of the subject, conflicts of interest, availability, experience in the particular procedure and any other selection criteria that may be specified in the Delivery Order. Choice of dispute resolution professional shall be approved by the EPA Project Officer (PO), Delivery Order Project Officer (DOPO) and program office coordinator.
- Assisting the EPA PO, DOPO and program office coordinator in developing a list of potential participants and identifying a tentative set of issues to be addressed

- With the EPA PO, DOPO and program office coordinator consultation, prepare and distribute background information on the potential issues to potential participants in a dialogue or negotiation under exploration.
- Contacting potential parties to discuss their possible participation in the consultative process.
- Working with EPA and the parties to construct a mutually acceptable agenda and schedule for the meeting.
- Chairing all plenary sessions of negotiations or dialogue. The facilitator shall assist participants in articulating their interest, identifying areas of agreement, narrowing areas of disagreement and articulating options and alternatives.
- Facilitating meetings of work groups, breakout groups or caucuses if the project plan calls for facilitated workgroup meetings.
- Handling all logistics of arranging meetings for participants; this includes scheduling, arranging facilities and notifying participants.
- Preparing draft summaries or minutes of each meeting and distributing them to the EPA PO, DOPO program office coordinator and participants for comment, and upon revision, distributing final summaries or minutes.
- Communicating with participants between meetings, if additional meetings are scheduled, to ensure that issues and concerns have been communicated accurately and that participants are adequately prepared for the next meeting.
- Assistance in settling disputes during implementation of any agreements reached.

### 3. ALTERNATE DISPUTE RESOLUTION SERVICES FOR SITE OR FACILITY SPECIFIC LITIGATION, SUCH AS ENFORCEMENT CASES, AND PERMITTING DISPUTES

EPA Regional Offices and Headquarters are involved in many site or facility specific disputes such as enforcement actions taken as a result of violation of environmental statutes or regulations, orders, decrees, or permits. Cases where EPA is taking enforcement action or when an outside party is suing EPA over a case specific situation can benefit from a variety of alternate dispute resolution services ranging from mediation to "mini-trials". In each of these cases a neutral third party skilled in dispute resolution processes assists the parties in reaching a mutually acceptable solution to the case. The contractor shall provide mediators, facilitators or other dispute resolution professionals who are experienced in a variety of dispute resolution processes.

Tasks may include the following:

- o Selecting appropriate dispute resolution professional or team, taking into account knowledge of the subject, conflicts of interest, availability, experience in the particular ADR procedure and any other selection criteria that may be specified in the Delivery Order. Choice of dispute resolution professional(s) shall be approved by the EPA Project Officer (PO), Delivery Order Project Officer (DOPO) and program office coordinator, and if appropriate, by the parties to the dispute.
- o Review of potential cases with the EPA DOPO, case attorney, and technical staff to recommend whether a case is appropriate for ADR.
- o Contacting each of the parties' representatives or counsel to propose the use of ADR and to explore the needs of each party and to design an appropriate process.
- o Upon approval of the ADR design by the EPA DOPO, legal and techncical staff and the parties, the Contractor shall implement the process as designed.
- o Handling all logistics of arranging meetings for the parties; this may include, but is not limited to: scheduling, arranging facilities, and notifying participants.
- o Preparing reports, summaries, drafts of agreements as relevant, necessary and assigned by the EPA PO & DOPO. Reports shall be presented in draft, and upon incorporation of comments, distributed in final.
- o Communicating with parties between meetings, as needed, to ensure that issues and concerns have been communicated accurately and that participants are adequately prepared for the next meeting.
- o Assistance in settling disputes during implementation of agreements or settlements.

### 4. ARBITRATION

The Administrative Dispute Resolution Act, Public Law 101-552, provides for both non-binding and binding arbitration of disputes between the Federal government and other parties Procedures to be followed by the government are stated in some detail in that act and provide the basis for agency arbitration policies. Executive Order # 12778 on Civil Justice Reform also allows for arbitration.

On May 30, 1989 EPA promulgated rules under the Superfund Amendments and Reauthorization Act that provide procedures for binding arbitration of disputes arising from EPA's Superfund cost recovery program. Cases to be arbitrated under this program must meet strict procedural and substantive requirements, must be for amounts under $500,000 and must not have been referred to the Department of Justice.

The contractor shall provide arbitration services for cases identified by EPA attorneys under the Agency's arbitration policies. Arbitrators are not necessarily dispute resolution professionals, they may be retired judges, project managers, accountants, cost control specialists, etc. Arbitrators shall be selected on a case-by-case basis according to the procedures delineated in the Act and applicable rules and policies. Arbitrators may be dispute resolution professionals listed on this contract or expert consultants retained specifically for a case. Arbitrators shall follow the procedures outlined in the Act, and applicable rules and policies during the arbitration process.

Tasks may include the following:

- Selecting appropriate arbitrator(s), taking into account knowledge of the subject, conflicts of interest, availability, experience in the particular arbitration procedure and any other selection criteria that may be specified in the Delivery Order. Choice of arbitrator(s) shall be approved by the EPA Project Officer (PO), Delivery Order Project Officer (DOPO) and program office coordinator and if, appropriate, by the parties to the dispute.
- Contacting each of the parties' representatives or counsel to explore the needs of each party and to design an appropriate arbitration proceeding.
- Upon approval of the arbitration design by the EPA DOPO, legal and techncical staff and the parties, implementing the process as designed.
- Handling all logistics of arranging meetings for the parties. This could include scheduling, arranging, facilities, and notifying participants.
- Preparing reports, summaries, drafts of agreements as relevant, necessary and assigned by the EPA PO & DOPO. Reports shall be presented in draft, and upon incorporation of comments, distributed in final.

- o Communicating with parties between meetings, as needed, to ensure that issues and concerns have been communicated accurately and that participants are adequately prepared for the next meeting.

- o Issuing decisions as appropriate under the Administrative Dispute Resolution Act and as provided for under other applicable regulations or policies.

## 5. PROCESS EVALUATION

The EPA Consensus and Dispute Resolution Program believes that many of EPA's decision making processes and disputes can be improved by better structured interactions with parties, either facilitated or not. Knowing more about the origins of disputes and the reasons for delays in decision making can help the Agency design dispute avoidance and dispute resolution systems that result in more efficient operation. There are a number of types of studies that can be used to investigate ways to reducing disputes.

Feasibility studies and surveys are useful in determining whether dispute resolution and consensus building techniques are effective in improving quality or reducing costs. Evaluating the reasons for success or failure of any process/proceeding provides lessons in design and implementation that are valuable in structuring future proceedings on related subjects. Pilot projects with careful evaluation steps built in can help the Agency refine dispute avoidance and resolution systems.

A Delivery Order prepared by EPA will specify the type of dispute to be studied, the general design of the study and the type of report needed.

The Contractor shall provide support in accumulating and summarizing information on use of ADR in EPA disputes, and in evaluating the sources of disputes, applications of various ADR and consultative processes to the resolution of disputes, conduct pilot projects and provide case status reports, case studies and evaluations. The EPA PO, DOPO will specify in each Delivery Order whether or not it is appropriate to utilize the same dispute resolution professional who provided the service in the original Delivery Order.

Tasks performed by the contractor may include:

- o Selecting appropriate dispute resolution professional, taking into account knowledge of the subject matter, type of proceeding, conflicts of interest and availability and any other selection criteria that may be specified in the Delivery Order. Choice of dispute resolution professional shall be approved by the EPA Project Officer (PO), Delivery Order Project Officer (DOPO) and program office coordinator.

- Based on the needs stated in the delivery order, propose a detailed study plan to the EPA PO, DOPO, and program office coordinator.
- Upon EPA PO, DOPO and program office coordinator approval proceed with the study or pilot project.

Studies and reports may include some or all of the following elements, studies are not limited to these elements:

- Conducting interviews with some or all of the following: EPA staff, other Federal government staff, industry representatives, public interest group representatives, state or local officials, and dispute resolution professionals who have handled similar disputes.
- Reviewing literature on similar types of issues or disputes.
- Observing negotiation and dispute resolution proceedings.
- Reviewing documents, correspondence, dockets, case files and information generated by the parties to a dispute.
- Accumulating and summarizing information on the use and status of ADR proceedings in regional and headquarters EPA cases.

Reports shall be tailored to the needs and format specified in individual delivery orders.

### 6. TRAINING SUPPORT

Contractor support shall be provided in the area of training in negotiation, dispute resolution and consultative processes with the goal of achieving better, more efficient resolution of environmental issues. Support shall be provided in environmental law as is needed to facilitate EPA staff and negotiating parties' understanding of the statutory and regulatory bases for rule or policy development. Participants in training seminars may be EPA and other government staff, and committee, dialogue or workshop group members as EPA considers necessary and appropriate.

Tasks may include:

- Design of training seminars from 2 hours to several days long.
- Writing and production of training materials for use in such seminars. Printing shall be within the

limitations stated in the contract. EPA retains ownership of all training materials.

- Logistical tasks involved in conducting the seminars such as registration and notification of participants, arranging meeting facilities and support, providing required supplies and equipment for presenting the course.

- Conducting training sessions or seminars

- Distribute Project Officer approved evaluation forms to every trainee. The completed forms shall be provided to the Project Officer after each session or seminar.

## 7. DIRECT SUPPORT AND TECHNICAL SUPPORT

The success or failure of a dispute resolution or collaborative problem solving process depend most heavily on correctly identifying the parties, issues and proceeding. However a number of logistical issues have significant effects on the efficiency and credibility of the proceeding. The logistical issues most often encountered are: appropriate meeting facilities and equipment, access to neutral expert consultants, and financial aid for participant travel to participate in a proceeding.

Studies show that the facilities provided for negotiation, and other consultative processes and training affect the efficiency and quality of the proceeding. Many times facilities/equipment/supplies appropriate to the size or purpose of the group are not available at EPA on a timely basis to conduct efficient quality proceedings. Meeting rooms must be adequate in size and number for the projected use. Equipment (such as projectors, flip charts, markers) appropriate to the purpose of the meeting shall be available. The Contractor shall obtain meeting facilities and equipment as ordered in Delivery Orders through lease or rental arrangements if they are not available at the Contractor's facilities.

Conflicting factual assertions sometimes arise that may require evaluation, assessment, verification, calculation, and analysis by a specialist in the narrow field of concern. This specialist is most valuable if he/she is not affiliated with any of the parties to the negotiation, dialogue or dispute. For example, the committee may require specialized advice on statistical sampling methods, economic analyses, or chemical or biological analytical test methods.

There are times when it is necessary for the Agency to assist parties in covering expenses incurred in participating in negotiations or dialogues because a balance of interest groups must be present. The Federal Advisory Committee Act and the Negotiated Rulemaking Act both authorize this type of assistance*.

Tasks may include:

- Obtaining meeting room facilities, equipment (such as but not limited to audio-visual equipment, access to word processing and photocopying equipment) and other allowable, miscellaneous services, as are determined by the project staff to be appropriate and necessary in helping the parties achieve the goals of the assigned task.

- Assistance in locating and retaining subject matter experts in such fields as statistics, economics, engineering, medicine, toxicology, epidemiology, agriculture, and other technical or specialized fields. Such support shall require the advance approval of the project and contracting officers.

- Arranging for and reimbursing the travel (airline or train, automobile rental, and hotel bookings) of members of committees (non FACA), workgroups, dialogue groups, workshops, when necessary, appropriate and assigned by the EPA PO, DOPO and program office coordinator in accordance with accomplishing work directly related to the Statement of Work of this contract.

* The ACO based on a recommendation from the EPA PO shall ensure that such assistance is allowable and appropriate under the Federal Advisory Committee Act, the Administrative Dispute Resolution Act, the Negotiated Rulemaking Act and or other statutory or regulatory authorities.

8. SPECIAL DUTIES OF THE PRIME CONTRACTOR

Because the EPA expects that performance of the work under this contract will involve the forming of a team of service providers, the prime contractor shall have the following tasks:

- Conduct a yearly meeting of all team subcontractors and EPA program/contract managers to: (1) review EPA specific procedures for use of dispute resolution procedures; (2) review the work performed the previous year with an evaluation of lessons learned and recommended changes. Total number of contractor participants for this yearly meeting shall not exceed 50 without prior approval of the Contracting Officer. This yearly meeting shall take place during the first month of the Base Period and only discuss item (1) above; if exercised Option Periods I,II,III shall have the yearly meeting during the last month of the period of performance to discuss both items (1) and (2) above. Option Period IV, if exercised, shall have a yearly meeting during the last month of the period of performance to discuss only item (2) above.

- If a subcontractor does not have the capability in house, arranging the logistics of meetings, particularly in the

Washington, D.C. area.

- If a subcontractor does not have the capability in house, making non-federal government participant travel arrangements.
- If a subcontractor does not have the capability in house, tracking and reimbursing non-federal government participant travel expenses.
- If a subcontractor does not have the capability in house, handling the invoicing and collection of funds cost shared by non-EPA parties.

### C.4 INCORPORATION OF CONTRACTOR'S TECHNICAL PROPOSAL (EP52.210-120) (APR 1984)

The Contractor's technical proposal entitled, "DISPUTE RESOLUTION SUPPORT SERVICES FOR REGULATORY NEGOTIATION AND OTHER CONSULTATIVE ACTIVITIES" dated 1/21/93, Revised Proposal dtd. 9/3/93, and BAFO dtd. 1/14/94, are incorporated by reference and made a part of this contract. In the event of any inconsistency between the provisions of this contract and the Contractor's technical proposal, the contract provisions take precedence.

## SECTION F - DELIVERIES OR PERFORMANCE

### F.1 NOTICE LISTING CONTRACT CLAUSES INCORPORATED BY REFERENCE

NOTICE: The following solicitation provisions and/or contract clauses pertinent to this section are hereby incorporated by reference:

FEDERAL ACQUISITION REGULATION (48 CFR CHAPTER 1)

| NUMBER | DATE | TITLE |
|---|---|---|
| 52.212-13 | AUG 1989 | STOP-WORK ORDER |

### F.2 REPORTS OF WORK (EPAAR 1552.210-70) ALTERNATE I (APR 1984)

The Contractor shall prepare and deliver the below listed reports to the designated addressees. Each report shall cite the contract number and identify the Environmental Protection Agency as the sponsoring agency.

### F.2.1 PROJECT SPECIFIC REPORTS

All project specific reports shall be provided first in draft form. Upon receipt of written comments from the EPA PO and DOPO, the contractor shall revise the report and distribute final copies as stated in this section and in individual delivery orders. The Contractor shall submit reports pertinent to each proceeding (negotiation, dialogue, workshop, case settlement etc.) as ordered in each delivery order. Specific contents of each report, in addition to those minimum contents specified below, will be identified in individual delivery orders. The following reports are not necessarily the universe of reports that may be required in delivery orders, they are examples of the most common reports.

### F.2.1.(a) CONVENING REPORTS

As directed in individual delivery orders, the Contractor shall furnish a Convening Report which assesses whether appropriate parties and issues exist for dialogue or negotiation.

The contents of each Convening Report shall include, as a minimum:

(1) a list of persons and entities who the convenor has contacted;

(2) an evaluation of the balance and mix of parties/interest groups, their desire to participate in good faith, their alignment on issues;

(3) the design and scope of the recommended dispute resolution or consultative process; and,

(4) additional relevant information to assist the EPA Project Officer and Delivery Order Project Officer in determining whether the item is a suitable candidate for the chosen consultative process (e.g., dialogue or negotiation.)

The Convening Report shall be submitted to the following addressees in accordance with the schedule specified in each individual delivery order.

Distribution

| Number of Copies | Addressee |
|---|---|
| THREE (3) | PROJECT OFFICER |
| ONE (1) | CONTRACTING OFFICER |
| ONE (1) | DELIVERY ORDER PROJECT OFFICER |

F.2.1.(b) PROJECT SUMMARY REPORT

As directed in individual delivery orders, the Contractor shall furnish a Project Summary Report prepared by the facilitator of the dispute resolution/consultative process. The contents shall include:

(1) Meeting Summaries with relevant and necessary attachments;

(2) Copies of documents compiled by or agreed upon by the committee (groundrules, agreements, statements, fact sheets etc.)

(3) Relevant substantive correspondence between the facilitator and the participants and between the participants themselves.

(4) Process evaluation by the facilitator summarizing results of the negotiation, analysis of issues and balance of parties, procedural lessons learned, recommendation for improvements.

### F.2.1.(c) EVALUATION REPORTS

As directed in individual delivery orders, the Contractor shall furnish an Evaluation Report which provides an unbiased evaluation of a completed negotiation by a trained dispute resolution specialist (convenor/facilitator) not involved as a convenor/facilitator in that negotiation.

The contents of each Evaluation Report shall include, as a minimum:

(1) Analysis of the substantive issues - whether they were appropriate and resolvable.

(2) Analysis of the selection and balance of the parties, whether all necessary parties were present and willing to participate in good faith.

(3) Analysis of the design of the process and whether the design was appropriate to the issues and parties.

(4) Analysis of whether adequate support was available to the EPA and the parties.

(5) Recommendations on improvements in the convening process, design of the proceeding

The Evaluation Report shall be submitted to the following addressees in accordance with the schedule specified in each individual delivery order.

Distribution

| Number of Copies | Addressee |
|---|---|
| THREE (3) | PROJECT OFFICER |
| ONE (1) | CONTRACTING OFFICER |
| ONE (1) | DELIVERY ORDER PROJECT OFFICER |

### F.2.1.(d) AGENDAS, EVALUATIONS, SUMMARIES

In addition to providing copies of the above documents to the Project Officer and DOPO, the Contractor shall furnish the Project Officer and DOPO with copies of all meeting agendas, meeting summaries, training agendas, training evaluations and training material and any other written deliverables listed in the delivery order.

### F.3 MONTHLY PROGRESS REPORT--INDEFINITE DELIVERY/INDEFINITE QUANTITY FIXED-RATE SERVICES CONTRACT (EPAAR 1552.210-74) (SEP 1990)

(a) The contractor shall furnish FOUR (4) copies of a combined monthly technical and financial progress report briefly stating the progress made, including the percentage of the work ordered and completed during the reporting period. Specific discussions shall include difficulties encountered and remedial action taken during the reporting period and anticipated activity during the subsequent reporting period.

(b) The report shall include the following financial information for each delivery order:

(1) Delivery order number, date and title;

(2) EPA client organization;

(3) Period of performance, including explanations for any extensions that may be needed;

(4) Number of hours, loaded rate applied, and corresponding total dollar amount expended for each employee (by name) within all labor categories employed during the reporting period;

(5) Cumulative number of hours and corresponding dollar amounts expended to date by labor category;

(6) Cumulative listing of all invoices submitted including invoice number, date submitted, period of invoice, total amount of invoice, and amount paid;

(7) Any accumulated charges that have not been invoiced and reasons why they have not been billed;

(8) Estimated costs and labor hours to be expended during the next reporting period.

(c) The reports shall be submitted to the following addresses on or before the 20th of each month following the first complete calendar month of the contract. Distribute reports as follows:

Distribution

| Number of Copies | Addresses |
|---|---|
| THREE (3) | PROJECT OFFICER |
| ONE (1) | CONTRACTING OFFICER |
| ONE (1) | DELIVERY ORDER PROJECT OFFICER |

## H.14 NOTIFICATION OF CONFLICTS OF INTEREST REGARDING PERSONNEL

(a) In addition to the requirements of the contract clause entitled "Organizational Conflicts of Interest," the following provisions with regard to employee personnel performing under this contract shall apply until the earlier of the following two dates: the termination date of the affected employee(s) or the expiration date of the contract.

(b) The Contractor agrees to notify immediately the EPA Project Officer and the Contracting Officer of (1) any actual or potential personal conflict of interest with regard to any of its employees working on or having access to information regarding this contract, or (2) any such conflicts concerning subcontractor employees or consultants working on or having access to information regarding this contract, when such conflicts have been reported to the Contractor. A personal conflict of interest is defined as a relationship of an employee, subcontractor employee, or consultant with an entity that may impair the objectivity of the employee, subcontractor employee, or consultant in performing their assigned work.

(c) The Contractor agrees to notify each Project Officer and Contracting Officer prior to incurring costs for that employee's work when an employee may have a personal conflict of interest. In the event that the personal conflict of interest does not become known until after performance on the contract begins, the Contractor shall immediately notify the Contracting Officer of the personal conflict of interest. The Contractor shall continue performance of this contract until notified by the Contracting Officer of the appropriate action to be taken.

(d) The Contractor agrees to insert in any subcontract or consultant agreement placed hereunder, provisions which shall conform substantially to the language of this clause, including this paragraph (d), unless otherwise authorized by the Contracting Officer.

## H.15 LIMITATION OF FUTURE CONTRACTING

(a) The parties to this contract agree that the Contractor will be restricted in its future contracting in the manner described below. Except as specifically provided in this clause, the Contractor shall be free to compete for contracts on an equal basis with other companies.

(b) If the Contractor, under the terms of this contract, or through the performance of work pursuant to this contract, is required to develop specifications or statements of work and such specifications or statements of work are incorporated into an EPA solicitation, the Contractor shall be ineligible to perform the work described in that solicitation as a prime Contractor or subcontrattor under an ensuing EPA contract.

(c) The Contractor, during the life of the delivery order, and for a period of seven (7) years after completion of the delivery order:

(1) shall not represent or act on behalf of any entity providing services other than of an ADR nature, pertaining to a site, facility or other specific matter for which the contractor previously provided ADR services under this contract without the prior written approval of the Contracting Officer, or his/her designee after the termination of this contract; and

(2) shall not represent or act on behalf of any entity providing services of any nature pertaining to a site, facility or other specific matter for which the contractor previously provided ADR services under this contract, unless the contractor employee executed a non-disclosure agreement (Attachment K) prior to the initiation of the ADR services for EPA.

(3) Within 15 calendar days of receipt of a request from the contractor for approval of future contract services under H.15 (c) (1) above, EPA will respond indicating the status of the request including (if applicable) an anticipated time of response and the issues being considered. Nothing herein shall excuse the contractor from responsibility for compliance with the provisions of Clause H.15.

(d) The Contractor agrees in advance that if any bids/proposals are submitted for any work that would require written approval of the Contracting Officer prior to entering into a contract subject to the restrictions of this clause, then the bids/proposals are submitted at the Contractor's own risk Therefore, no claim shall be made against the Government to recover bid/proposal costs as a direct cost whether the request for authorization to enter into the contract is denied or approved.

(e) To the extent that access to proprietary or confidential business or financial data of other companies is authorized under this contract, and as long as such data remains proprietary or confidential, the Contractor shall protect such data from unauthorized use and disclosure.

(f) The Contractor agrees to insert in each subcontract or consultant agreement placed hereunder, provisions which shall conform substantially to the language of this clause, including this paragraph (f), unless otherwise authorized by the Contracting Officer.

(g) A review process available to the Contractor when an adverse determination is received shall consist of a request for reconsideration to the Contracting Officer or a request for review submitted to the next administrative level within the Contracting Officer's organization. An adverse determination resulting from a request for reconsideration by the Contracting Officer will not preclude the Contractor from requesting a review by the next administrative level. Either a request for review or a request for reconsideration must be submitted to the appropriate level within 30 calendar days after receipt of the initial adverse determination.

## H. 16 PROJECT EMPLOYEE CONFIDENTIALITY AGREEMENT

(a) The Contractor recognizes that Contractor employees in performing this contract may have access to data, either provided by the Government or first generated during contract performance, of a sensitive nature which should not be released to the public without Environmental Protection Agency (EPA) approval. Therefore, the Contractor agrees to obtain Non-Disclosure Agreements (See Attachment K) from all of its employees working on requirements under this contract.

(b) If a contractor, through an employee or otherwise, is subpoenaed to testify or produce documents, which could result in such disclosure, the Contractor must provide immediate advance notification to the EPA so that the EPA can authorize such disclosure or have the opportunity to take action to prevent such disclosure. Such agreements shall be effective for the life of the contract and for a period of five (5) years after completion of the contract.

(c) The EPA may terminate this contract for convenience, in whole or in part, if it deems such termination necessary to prevent the unauthorized disclosure of information to outside entities. If such a disclosure occurs without the written permission of the EPA Contracting Officer, the Government may terminate the contract, for default or convenience, or pursue other remedies as may be permitted by law or this contract.

(d) The Contractor further agrees to insert in any subcontract or consultant agreement placed hereunder, provisions which shall conform substantially to the language of this clause, including this paragraph, unless otherwise authorized by the Contracting Officer.

## H.17 CONFIDENTIALITY OF INFORMATION SUBMITTED TO A NEUTRAL

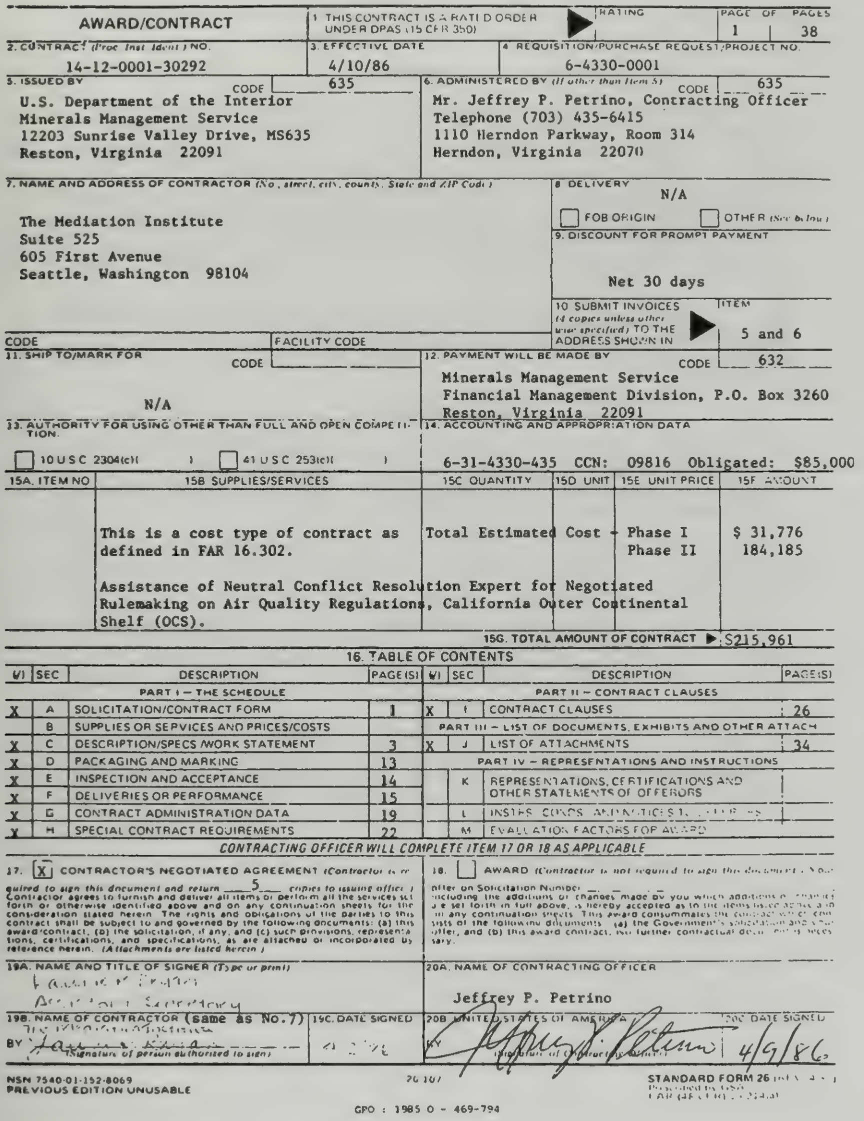
Dispute resolution communication provided in confidence to a neutral shall not be disclosed to any party or considered data subject to Government ownership (specifically, mediators' notes, recollections, or documents given to mediators in confidence by any party), unless such disclosure is provided for in the Administrative Dispute Resolution Act (Public Law No. 101-552):

1) all parties to the dispute resolution proceeding and the neutral consent in writing and, if the dispute resolution communication was provided by a non-party participant, that participant also consents in writing;

2) the dispute resolution communication has already been made public;

3) the dispute resolution communication is required by stature to be made public, but a neutral should make such communication public only if no other person is reasonably available to disclose the communication; or

4) a court determines that such testimony or disclosure is necessary to a) prevent a manifest injustice, b) help establish a violation of law, or c) prevent harm to the public health or safety of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings, i.e. information submitted in confidence should normally not be disclosed.



**AWARD/CONTRACT**

1. THIS CONTRACT IS A RATED ORDER UNDER DPAS (15 CFR 350) ▶ RATING

PAGE 1 OF 38 PAGES

2. CONTRACT (Proc. Inst. Ident.) NO. 14-12-0001-30292

3. EFFECTIVE DATE 4/10/86

4. REQUISITION/PURCHASE REQUEST/PROJECT NO. 6-4330-0001

5. ISSUED BY CODE 635

U.S. Department of the Interior
Minerals Management Service
12203 Sunrise Valley Drive, MS635
Reston, Virginia 22091

6. ADMINISTERED BY (If other than Item 5) CODE 635

Mr. Jeffrey P. Petrino, Contracting Officer
Telephone (703) 435-6415
1110 Herndon Parkway, Room 314
Herndon, Virginia 22070

7. NAME AND ADDRESS OF CONTRACTOR (No., street, city, county, State and ZIP Code)

The Mediation Institute
Suite 525
605 First Avenue
Seattle, Washington 98104

CODE FACILITY CODE

8. DELIVERY N/A

☐ FOB ORIGIN ☐ OTHER (See below)

9. DISCOUNT FOR PROMPT PAYMENT

Net 30 days

10. SUBMIT INVOICES (4 copies unless otherwise specified) TO THE ADDRESS SHOWN IN ▶ ITEM 5 and 6

11. SHIP TO/MARK FOR CODE

N/A

12. PAYMENT WILL BE MADE BY CODE 632

Minerals Management Service
Financial Management Division, P.O. Box 3260
Reston, Virginia 22091

13. AUTHORITY FOR USING OTHER THAN FULL AND OPEN COMPETITION.

☐ 10 U.S.C. 2304(c)( ) ☐ 41 U.S.C. 253(c)( )

14. ACCOUNTING AND APPROPRIATION DATA

6-31-4330-435 CCN: 09816 Obligated: $85,000

| 15A. ITEM NO | 15B SUPPLIES/SERVICES | 15C QUANTITY | 15D UNIT | 15E UNIT PRICE | 15F AMOUNT |
|---|---|---|---|---|---|
| | This is a cost type of contract as defined in FAR 16.302. | Total Estimated | Cost - | Phase I<br>Phase II | $ 31,776<br>184,185 |
| | Assistance of Neutral Conflict Resolution Expert for Negotiated Rulemaking on Air Quality Regulations, California Outer Continental Shelf (OCS). | | | | |

15G. TOTAL AMOUNT OF CONTRACT ▶ $215,961

16. TABLE OF CONTENTS

| (✓) | SEC | DESCRIPTION | PAGE(S) | (✓) | SEC | DESCRIPTION | PAGE(S) |
|---|---|---|---|---|---|---|---|
| | | PART I – THE SCHEDULE | | | | PART II – CONTRACT CLAUSES | |
| X | A | SOLICITATION/CONTRACT FORM | 1 | X | I | CONTRACT CLAUSES | 26 |
| | B | SUPPLIES OR SERVICES AND PRICES/COSTS | | | | PART III – LIST OF DOCUMENTS, EXHIBITS AND OTHER ATTACH. | |
| X | C | DESCRIPTION/SPECS./WORK STATEMENT | 3 | X | J | LIST OF ATTACHMENTS | 34 |
| X | D | PACKAGING AND MARKING | 13 | | | PART IV – REPRESENTATIONS AND INSTRUCTIONS | |
| X | E | INSPECTION AND ACCEPTANCE | 14 | | K | REPRESENTATIONS, CERTIFICATIONS AND OTHER STATEMENTS OF OFFERORS | |
| X | F | DELIVERIES OR PERFORMANCE | 15 | | L | INSTRS., CONDS., AND NOTICES TO OFFERORS | |
| X | G | CONTRACT ADMINISTRATION DATA | 19 | | | | |
| X | H | SPECIAL CONTRACT REQUIREMENTS | 22 | | M | EVALUATION FACTORS FOR AWARD | |

*CONTRACTING OFFICER WILL COMPLETE ITEM 17 OR 18 AS APPLICABLE*

17. ☒ CONTRACTOR'S NEGOTIATED AGREEMENT *(Contractor is required to sign this document and return* 5 *copies to issuing office.)* Contractor agrees to furnish and deliver all items or perform all the services set forth or otherwise identified above and on any continuation sheets for the consideration stated herein. The rights and obligations of the parties to this contract shall be subject to and governed by the following documents: (a) this award/contract, (b) the solicitation, if any, and (c) such provisions, representations, certifications, and specifications, as are attached or incorporated by reference herein. *(Attachments are listed herein.)*

18. ☐ AWARD *(Contractor is not required to sign this document.)* Your offer on Solicitation Number ____ including the additions or changes made by you which additions or changes are set forth in full above, is hereby accepted as to the items listed above and on any continuation sheets. This award consummates the contract which consists of the following documents: (a) the Government's solicitation and your offer, and (b) this award/contract. No further contractual document is necessary.

19A. NAME AND TITLE OF SIGNER (Type or print)

[illegible]
Assistant Secretary

19B. NAME OF CONTRACTOR (same as No.7)
The Mediation Institute
BY
(Signature of person authorized to sign)

19C. DATE SIGNED [illegible]

20A. NAME OF CONTRACTING OFFICER

Jeffrey P. Petrino

20B. UNITED STATES OF AMERICA
BY
(Signature of Contracting Officer)

20C. DATE SIGNED 4/9/86

NSN 7540-01-152-8069
PREVIOUS EDITION UNUSABLE

26-107

STANDARD FORM 26 (REV. 4-85)
Prescribed by GSA
FAR (48 CFR) 53.214(a)

GPO : 1985 O - 469-794

Contract No. 14-12-0001-30292
Page 2

## PREAMBLE

A. This contract consists of this document and the Contractor's technical proposal dated February 18, 1986, in response to the Minerals Management Service's Solicitation No. 3292 dated January 14, 1986. This document sets forth the requirements, specifications, conditions, and restrictions which are binding on both parties. The Contractor's technical proposal is incorporated by reference to the extent it describes the procedures, methods, and documentation of this work. Any discrepancies shall be settled in favor of the Schedule of this contract. There are no conditions, restrictions, or qualifications to this contract other than what is expressed herein or in law.

B. The "Representations, Certifications, and Acknowledgements," completed by the Contractor as part of his business and cost proposal of February 18, 1986, are incorporated into the contract with the same force and effect as if set forth in full.

## CONSIDERATION

A. It is estimated that the total cost to the Government for full performance of this contract will be $215,961, of which the sum of $31,776 represents the estimated reimbursable costs for Phase I, and the sum of $184,185 represents the estimated reimbursable cost for Phase II.

B. Total funds currently available for payment and allotted to this contract are $85,000. Additional funds may be allotted from time to time by contract modification up to the full estimated cost of the contract over the entire period of performance (effective date through January 30, 1987); however, the Government will not be obligated to reimburse the Contractor for costs in excess of the current allotment, nor will the Contractor be obligated to continue performance and incur costs in excess of the amount allotted. For further terms on this incremental funding, refer to the general provision of this contract entitled "Limitation of Funds."

C. It is estimated that the amount currently allotted will finance performance of the contract from the effective date through September 30, 1986; however, the Contractor shall not incur any costs beyond delivery of the Phase I final report unless and until a written notice to proceed is received from the DOI Contracting Officer.

## SECTION C

## DESCRIPTION/SPECIFICATIONS/STATEMENT OF WORK

### C-1. BACKGROUND

The Department of the Interior (DOI), under authority of the Outer Continental Shelf (OCS) Lands Act, Section 5(a)(8), regulates the offshore oil and gas industry for compliance with national ambient air quality standards pursuant to the Clean Air Act, to the extent that offshore activities significantly affect the air quality of any State. The DOI rules pursuant to Section 5(a)(8) were finalized in March 1980. This authority extends to oil and gas facilities located in federally administered waters (beyond 3 miles from shore). Sources of air quality emissions situated within 3 miles from shore are administered by the U.S. Environmental Protection Agency, and the State and local Pollution Control agencies.

In July 1981, the State of California filed a lawsuit against the DOI over its offshore air quality rules claiming that the rules promulgated in 1980 by former Secretary Andrus were: (1) insufficient to protect the State's onshore air quality, (2) in violation of the Administrative Procedure Act and the National Environmental Policy Act, and (3) in violation of the Clean Air Act provision concerning conformity. The DOI has denied each of these claims. Formal hearings on arguments have been delayed because continuances have been granted to allow discussions between the litigants to reach an out-of-court settlement. The DOI and the State of California have fundamental differences over the nature and extent of the Federal offshore air quality rules concerning air quality emissions from OCS facilties. The Citizens for a Better Environment (CBE) and the Coalition for Clean Air (CCA) have intervened on the part of the State of California, and the Western Oil and Gas Association (WOGA), and 12 companies have intervened on the part of the DOI in the lawsuit. The DOI, the State of California the CBE, the CCA, and WOGA are called herein "the parties to the litigation."

Representatives from the DOI and the State of California have met several times to try to resolve issues in the lawsuit out of court. As a result of these consultations, the DOI developed and published in the Federal Register (January 7, 1985) an Advance Notice of Proposed Rulemaking (ANPR) suggesting a regulatory framework to address, in part, some of the concerns expressed by California, and asking industry and the affected public to comment.

On April 8, 1985, the State of California, through its Secretary of Environmental Affairs, proposed to the DOI that a negotiated rulemaking process be used to develop a proposal for revised air quality rules for offshore California. The Secretary of the Interior and the Governor of California have agreed that this is an appropriate process to explore for resolving the remaining air quality issues. The negotiated rulemaking process was thought to be a better means to address everyone's concerns and possibly lead to agreement among all parties. Agreement may permit the parties to dismiss the existing lawsuit. The five parties to the litigation agreed upon

Contract No. 14-12-0001-30292
Page 4

SECTION C-continued

C-1. BACKGROUND (continued)

a "Summary Plan for Negotiating the Rulemaking on California Offshore Air Quality" which established a framework for the negotiations. The four other parties to the litigation named above have assisted the DOI in the selection of a contractor to serve as a facilitator and are expected to participate in the negotiated rulemaking. If consensus is reached, the agreed upon rule would be published in the Federal Register as DOI's proposed rule, subject to the applicable Federal laws and regulations concerning rulemaking.

To pursue a negotiated rulemaking, the DOI needs the assistance of a neutral, third-party conflict resolution expert(s) to act as a facilitator to guide the negotiation process and to assist the negotiating parties in reaching settlement.

C-2. OBJECTIVE

The objective of this contract is to enable the DOI to develop air quality requirements for OCS activities offshore California through a negotiated rulemaking process. This contract will provide a third-party facilitator to assist DOI and other parties in attempting to resolve issues in the lawsuit. In order to be effective, the facilitator must function and be perceived as wholly unbiased.

C-3. DEFINITIONS AND DESCRIPTIONS

Negotiated Rulemaking: A negotiated rulemaking is a process which brings together the Agency proposing a regulation with the affected and interested public to negotiate the basis for a proposed rule. In this instance, the subject of the negotiated rulemaking is air quality rules for the California OCS areas. The end product of a successfully negotiated rulemaking is the basis for a proposed rule. The Agency, acting in good faith, is committed to incorporating provisions on which there is unanimous agreement in its proposed rule, subject to the applicable Federal laws and regulations concerning rulemaking, while reserving the right to incorporate in its proposed rule provisions which the DOI believes to be appropriate even though consensus is not reached as to such provisions, if any.

Conflict Assessment: The purpose of the conflict assessment is to evaluate the willingness of the potential participants (which are larger in number than the five parties to the litigation) to negotiate and to assess whether there is a chance for reaching agreement. The Federal Agency and the other parties to the litigation will use the results of the conflict assessment as one of the factors in their respective decisions to pursue negotiated rulemaking.

SECTION C-continued

C-3. DEFINITIONS AND DESCRIPTIONS (continued)

Working Groups: Working groups, consisting of subsets of all the participants, may be established to allow in-depth discussion of one or more separate issues. Up to two working group meetings may go on simultaneously.

Facilitation: A facilitator is a neutral third party whose role is to guide the negotiation process and help the participants reach agreement. The facilitator focuses the negotiating parties on the issues, helps them address the interests of all the participants, and helps them reach agreements. This facilitation takes place not only in formal meetings but also in informal discussions among the parties. The facilitator's only authority is that which he/she is given by the participants, and it is never a decisionmaking, arbitration, or mediation authority.

It is not the function of the contractor to:
- Limit the ability of any party to define issues or concerns.
- Draft or recommend a proposed rule.
- Publicly or privately comment on the merits of the parties' issues, positions, or concerns.

Groundrules: Subject to the terms of the facilitator's contract and applicable Federal laws and regulations to which the DOI is subject, the parties to the negotiations will establish groundrules to focus the negotiations which are enforced by the facilitator. One groundrule is that the negotiation process will focus only on the California OCS air quality rulemaking. The negotiating parties will be encouraged to establish milestones of progress that must be achieved if the process is to continue.

Consensus: Consensus is the goal of the negotiation process. Consensus is defined to be unanimous agreement. If all parties cannot agree on a particular provision, then no formal recommendation on that provision would emerge from the negotiations.

Recording: Recording of meetings, such as using flip charts, etc., is an effective means of focusing attention, displaying information, assuring common understanding, and making progress, in addition to providing a record of the proceedings.

Speaking Papers: These papers outline the discussions that will be held with each party during the conflict assessment. The papers will vary depending on the party being interviewed and are not information collection instruments as defined by the Office of Management and Budget.

C-4. SCOPE OF WORK

A two-phased program of consultant services is contemplated. Phase I consists of the preparation of the conflict assessment. Following completion of Phase

Contract No. 14-12-0001-30292
Page 6

SECTION C-continued

C-4. SCOPE OF WORK (continued)

I of the contract, the DOI, in consultation with the other parties to the litigation, will decide whether it will require the contractor to provide services in Phase II. The contractor shall not incur any costs beyond delivery of the Phase I final report unless and until a written notice to proceed is received from the DOI Contracting Officer. Phase II consists of two elements: (a) development of agreed issues and facts and (b) negotiation sessions. During the initial Phase II sessions, the parties will establish the groundrules and a technical basis for the negotiation sessions, including the issues to be resolved. Following completion of these sessions, DOI, in consultation with the other parties to the negotiations, will decide whether to proceed with the negotiation sessions. During the negotiation sessions, the negotiators will work towards resolution of the identified issues.

Phase 1: For this portion of the contract, the contractor will conduct a conflict assessment. The contractor shall work with DOI staff and management and the other parties to the litigation to perform the conflict assessment. The contractor shall perform the following tasks:

Item 1: Develop and maintain a list of potential parties to the negotiation as identified by DOI and the other parties to the litigation and independently locate additional individuals and groups having a stake or interest in developing the proposed rules.

Item 2: Develop a plan (including results of Item 1) and appropriate speaking papers (see definitions) for conducting telephone and personal interviews with parties identified in Item 1 and submit copies of the plan and speaking papers to each party to the litigation for review and approval.

Item 3: Conduct telephone interviews with parties identified in the approved plan (Item 2) to determine their willingness to participate in the conflict assessment. Discuss any preconditions to negotiation and discuss the authority of each party to represent its particular constituency.

Item 4: Meet individually with key parties identified in the plan (Item 2) and conduct personal interviews to determine at least the following for each party:

- Issues and underlying interests.
- Current and past positions and flexibility on all issues.
- Desire to participate in the negotiated rulemaking process and willingness to negotiate.
- Charter or the ability to represent effectively and to make commitments for constituencies.
- Personal resources available to participants and availability of facilities for hosting meetings.
- Any additional preconditions or concerns that should be addressed.
- Ability of parties having similar interests and positions to work together in coalitions.

SECTION C-continued

## C-4. SCOPE OF WORK (continued)

As necessary, followup interviews or interviews with some members of groups or parties shall be conducted by telephone.

Item 5: Provide weekly oral reports to the DOI Contracting Officer and the Contracting Officer's Technical Representative (COTR) on the status and progress of the conflict assessment process, including discussion of contacts made, meetings held, and any questions regarding the contractors work requiring resolution by DOI or by other parties. Discuss with the Contracting Officer and COTR any difficulties in performance that may significantly alter the contractor's approved work plan, proposed solution by contractor, required action and potential changes in cost or schedule as a result of such difficulties. The tone of these discussions will be strictly neutral, and the purpose is solely to manage the contract.

Item 6: Describe the conflict assessment process, analyze the results, and prepare a draft conflict assessment report on the results of interviews along with a professional statement of opinion on the suitability and prospect for success of the proposed negotiation considering the balance/mix of parties involved, the scope and complexity of the issues, the desire/ability of the parties to negotiate in good faith, and any requested preconditions. Ideally, it will be a "consensus document" as described in the contractor's proposal. The report shall list all parties interviewed and contacted and shall discuss for each party the subjects listed in Item 4 and all other pertinent information. Copies of any written materials used in interview discussions or written material provided by potential parties to the negotiation shall be appended to the report. Confidential information essential to a reasoned decision on whether to proceed with negotiation shall be synopsized in the report without attribution. No comments, positions, or suggestions are for attribution to any individual or party without their express consent. Versions of the draft report will remain a work product of the facilitators until the parties to the litigation have had opportunity to discuss the content and findings. No judgement will be offered as to any specific individual's candidness or cooperation. Should it be determined that it is not appropriate to proceed with negotiations, no individual or party will be singled out as the reason for such an assessment. Also, the report will identify and discuss possible coalitions for Phase II negotiations and the types of groundrules that would be further developed in Phase II.

Each facilitator on the contractor's team should attend one meeting in Washington, D.C., with representatives of the parties to the litigation to review and discuss findings and the draft conflict assessment report. Prepare a final report including corrections and additions as required and agreed to (see Specifications). This report shall be submitted to DOI and to the parties to the litigation.

SECTION C-continued

C-4. SCOPE OF WORK (continued)

Item 7: The facilitator shall assist the parties to the litigation to agree on a list of parties to be included in the Phase II sessions and working group meetings. (These agreed-upon participants are designated as the parties to the negotiations.)

Phase II: The DOI, in consultation with the parties to the litigation, will take up to 21 days from the date of receipt of the final conflict assessment report to decide whether to proceed with Phase II of the contract. Phase II consists of the facilitation of the development of issues and agreed facts and of negotiation sessions. The DOI may terminate the contract at any time and proceed directly to rulemaking or solicit new proposals to perform work in Phase II. As a facilitator, the contractor shall maintain a neutral, third-party position, taking no direction from any of the individual negotiating parties, including the negotiating team representing the DOI. As a result of the Phase I consensus and further consensus reached at the first Phase II meeting (see Item 12), the contractor may be directed by the DOI Contracting Officer to submit a new business and cost proposal for performance of Phase II which may lead to negotiation of a contract modification. All direction for fulfillment of contract obligations will come from the DOI Contracting Officer and COTR, not part of the DOI negotiating team. Within the limits of this contract, the contractor shall continue in this phase until settlement is achieved or until the DOI determines that the negotiation will be terminated. The contractor shall perform the following tasks during this phase:

Item 8: Manage certain logistical support (see C-6, Assumptions) for meetings. Serve as a point of contact for participants and coordinate notification and arrangements for meetings working with the host group. Maintain accurate records of all meetings and prepare meeting summaries for participants.

Item 9: Assist negotiating parties in forming coalitions of like positions and interests. The contractor will be available to assist individual parties or coalitions, as requested by the party and as consistent with the role of an impartial facilitator. Activities described in this task are to be performed coincidentally during the agreed number of Phase II negotiation sessions.

Item 10: Provide all necessary supplies, such as flip charts or other graphic materials, for facilitating and recording all meetings.

Item 11: Report orally monthly to the Contracting Officer and COTR on status/process of Phase II. Provide DOI and the parties to the negotiations each with one (1) copy of all meeting summaries and written progress reports on the negotiation on a quarterly basis. Reports are due the 10th day of the month following the end of each quarter and shall include the following:

- A summary of all work performed during the preceding 3 months including

Contract No. 14-12-0001-30292
Page 9

SECTION C-continued

C-4. SCOPE OF WORK (continued)

staff used for each meeting;

- A summary of all the Phase II sessions including issues addressed and progress on issues, noting where negotiations are progressing and where they are stalled on particular issues;

- A summary of any manpower, schedule, or cost problems encountered during the preceding quarter including an assessment of probable effect on the contractor's work, costs, or schedule, and statements of corrective action proposed; and

- A summary of plans or projections for contractor work during the next quarter including any new techniques or methods that are proposed to move the negotiations forward.

Item 12: Facilitate as many Phase II sessions as are established within the contract scope and agreed upon by the parties to the negotiations pursuant to the groundrules they have established. During these initial sessions, the contractor will act as a facilitator to assist the parties to:

- Agree on the identity of the issues to be resolved, simplify the issues, and identify the key elements of each issue.

- Agree on undisputed facts and issues.

- Agree on methods to resolve remaining disputed facts or issues.

- Agree on other matters that may assist in the development of a consensus including ground rules and milestones for the Phase II sessions.

A negotiation session may include several working group meetings. At times, two working group meetings may occur simultaneously. In such circumstances, the contractor must have sufficient personnel to facilitate both work group meetings.

Item 13: Continue the development that began in Phase I of draft ground rules for the negotiation. Develop final ground rules in conjunction with the negotiating parties.

Item 14: Prepare a report concurred in by all the negotiating parties listing the items of agreement and unresolved disputed issues considered under Phase II.

Item 15: Assist negotiating parties in developing and producing any necessary instrument(s) of agreement or settlement.

SECTION C-continued

C-4. SCOPE OF WORK (continued)

Item 16: Submit a draft and final project report to DOI and to the parties to the negotiations, and attend one meeting in Washington to discuss the negotiations and the draft report following the conclusion of the negotiation (successful or otherwise). The report document will discuss the result of the negotiation, if successful, as follows: The substance of the negotiation including facts and issues identified, resolved, and outstanding; a list of participants and whom they represented; a tabular or narrative list of meeting times, dates, places; solutions and alternatives explored; positions of the parties; and all agreements reached. In the absence of a negotiated agreement, the contractor will confer with the parties to the negotiation to develop a report that describes the issues in contention, the parameters of the disagreement, and the relative positions of the parties.

C-5. REPORT SPECIFICATIONS

A. Draft reports shall be typed double spaced and submitted as stated in Section F. Drafts shall be editorially and grammatically correct. Drafts received with numerous editorial and grammatical errors or not containing the required discussions will be returned to the contractor without further inspection by DOI. In such cases, additional costs of correcting draft reports and resubmitting them and for any resulting time delay will not be allowable costs under the contract.

B. The contractor shall make additions, revisions, or corrections relating to report format, factual error, and correct omissions or deficiencies as specified by the Contracting Officer or COTR. The contractor shall make additions, revisions or corrections relating to interpretation of data, judgments, or recommendations as mutually agreed.

C. The contractor shall prepare a final report, neatly typed, single spaced, in accordance with any corrections or additions as required and agreed to.

D. All reports submitted under the terms of this contract shall contain the following information on the cover page:

(1) Name and business address of the contractor.
(2) Contract number.
(3) Original contract dollar amount plus the amount(s) of each additional modification(s).
(4) Competitive or noncompetitive nature of the procurement.
(5) Name of the bureau or office, sponsoring program individual (the COTR), and his/her office name and address.

SECTION C-continued

## C-6. ASSUMPTIONS

The following assumptions have been made concerning the scope of work (see Article C-4) in estimating the total estimated cost of the contract.

### A. Related to Phase I, Item 3:

- Approximately 40 parties have provided comments to the Department of the Interior (DOI) on the Advance Notice of Proposed Rulemaking (ANPR).

### B. Related to Phase I, Item 4:

- Most commenters are located in California.

- A single two-(2-)week trip to California for personal interviews is envisioned.

### C. Related to Phase II:

Assumptions for meeting in Phase II are as follows:

- Twelve (12) meetings among parties to the negotiations. These may be full group meetings or may be up to two (2) simultaneous work group meetings. Please note that the DOI reserves the right, which shall be exercised only after consultation with the parties to the negotiations, to increase or to decrease the number of Phase II meetings.

- These sessions may be augmented by informal communications with the individual parties.

- At least two (2) facilitators/recorders will attend each session except the first which will be attended by all four (4) facilitators.

- Each negotiation session lasting 2 or 3 days--assume six (6) 3-day sessions and six (6) 2-day sessions.

- Meetings will be held in Los Angeles, California.

- Meeting facilities will be provided by the participants, as they determine.

### D. Related to Draft Report Review Meetings (Phase I, Item 6; Phase II, Item 16):

- Each of two (2) meetings for draft report review will take place at DOI headquarters, Washington, D.C. area with all parties to the litigation.

SECTION C-continued

C-6. ASSUMPTIONS (continued)

E. The following information will be available to the contractor from DOI:

- List of commenters on the ANPR
- Related laws and regulations

F. The contractor shall be responsible for the following:

- all contractor travel arrangements, accommodations, and subsistence requirements
- staff at all meetings sufficient to meet contract requirements
- supplies for all contractor tasks for all meetings
- meeting on the schedule of the negotiation participants
- production/reproduction of sufficient quantities of all deliverables, as specified
- logistical arrangements for meetings and coordination/notification of participants.

G. The contractor shall not be responsible for the following:

- providing meeting space
- travel/lodging arrangements for negotiating parties
- recording at public hearings or scoping meetings.

(NOTE: SECTIONS D AND E ARE OMITTED.)

## SECTION F

## DELIVERIES OR PERFORMANCE

### F-1. PERIOD OF PERFORMANCE

The period of performance of this contract begins on April 10, 1986, and Phase I ends on June 17, 1986, unless otherwise mutually agreed by the parties to the contract. This will be followed by a possible 3-week period for DOI and other parties to the litigation to decide whether to proceed with Phase II, and tentatively 30 weeks for Phase II, if undertaken, for a total contract period of 42 weeks from the date of the contract award.

### F-2. STOP-WORK ORDER (APR 1984)

A. The Contracting Officer may, at any time, by written order to the Contractor, require the Contractor to stop all, or any part, of the work called for by this contract for a period of 90 days after the order is delivered to the Contractor, and for any further period to which the parties may agree. The order shall be specifically identified as a stop-work order issued under this clause. Upon receipt of the order, the Contractor shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. Within a period of 90 days after a stop-work is delivered to the Contractor, or within any extension of that period to which the parties shall have agreed, the Contracting Officer shall either:

1. Cancel the stop-work order; or

2. Terminate the work covered by the order as provided in the Termination clause of this contract.

B. If a stop-work order issued under this clause is canceled or the period of the order or any extension thereof expires, the Contractor shall resume work. The Contracting Officer shall make an equitable adjustment in the delivery schedule, the estimated cost, the fee, or a combination thereof, and in any other terms of the contract that may be affected, and the contract shall be modified, in writing, accordingly, if:

1. The stop-work order results in an increase in the time required for, or in the Contractor's cost properly allocable to, the performance of any part of this contract; and

2. The Contractor asserts a claim for the adjustment within 30 days after the end of the period of work stoppage; provided, that, if the Contracting Officer decides the facts justify the action, the Contracting Officer may receive and act upon the claim asserted at any time before final payment under this contract.

SECTION F-continued

F-2. STOP-WORK ORDER (APR 1984) (continued)

C. If a stop-work order is not cancelled and the work covered by the order is terminated for the convenience of the Government, the Contracting Officer shall allow reasonable costs resulting from the stop-work order in arriving at the termination settlement.

D. If a stop-work order is not cancelled and the work covered by the order is terminated for default, the Contracting Officer shall allow, by equitable adjustment or otherwise, reasonable costs resulting from the stop-work order.

F-3. DELIVERABLES

The following list summarizes the deliverable products and their required dates for delivery. Deliverables shall be submitted as indicated, with one (1) copy each to the COTR and Contracting Officer in addition to any others specified. Item Numbers are those specified in Article C-4, Scope of Work.

A. Phase I

1. Conflict Assessment Plan and Speaking Papers (Item 2): Due April 17, 1986. One (1) copy to each party to the litigation.

2. Oral Reports on Status of Conflict Assessment (Item 5): Weekly oral report (via telephone) to the Contracting Officer and COTR until the week the draft Conflict Assessment is submitted.

3. Draft Conflict Assessment (Item 6): Due 4-1/2 weeks after approval of Conflict Assessment Plan (May 28, 1986, based on approval by April 24, 1986). Three (3) copies to DOI and one (1) copy to each party to the litigation.

4. Review Meeting (Item 6): With the Parties to the Litigation in Washington, D.C. tentatively on June 3, 1986.

5. Final Conflict Assessment (Item 6): Due two (2) weeks after return of draft Conflict Assessment and comments (June 17, 1986, based on approval by June 3, 1986). Three (3) copies to DOI and one (1) copy to each party to the litigation.

B. Phase II

1. Oral Reports (Item 11): Due monthly via telephone or in person to the COTR and Contracting Officer. Monthly reports will continue throughout this phase of the contract.

2. Meeting Summaries (Item 8): Due one (1) week following each negotiating meeting. One (1) copy to each party to the negotiations.

SECTION F-continued

## F-3. DELIVERABLES (continued)

3. Quarterly Progress Reports (Item 11): Due the 10th day of the month following the preceding quarter. One (1) copy to each party to the negotiations.

4. Draft Ground Rules (Item 13): Due one (1) week after initiation of Phase 2. One (1) copy to each party to the negotiations.

5. Final Ground Rules (Item 13): Due one (1) week after agreement by negotiating parties. One (1) copy to each party to the negotiations.

6. Issues/Facts Report (Item 14): Due one (1) week after being directed to complete the report by the Contracting Officer and COTR. One (1) copy to each party to the negotiations.

7. Instrument(s) of Agreement/Settlement (Item 15): Due one (1) week after being directed by the Contracting Officer and COTR. One (1) copy to each party to the negotiations.

8. Draft Project Report (Item 16): Due two (2) weeks after conclusion/termination of negotiations. Three (3) copies to each party to the negotiations.

9. Final Project Report (Item 16): Due one (1) week after comments/instructions received on the Draft Project Report. Three (3) copies to each party to the negotiations.

## F-4. PERFORMANCE EVALUATION CRITERIA

Contractor performance will be evaluated on the following criteria:

- Attends all scheduled meetings with sufficient staff
- Manages the negotiation process effectively
- Maintains required confidentiality and neutrality
- Adheres to best professional standards and judgment
- Provides necessary supplies and materials
- Provides for timely receipt of all deliverables
- Manages meeting logistics and arrangements timely and effectively.

## F-5. GOVERNMENT DIRECTION

The Government Contracting Officer will provide direction to, and control of, the contractor in order to prevent any misinterpreted tasks or inappropriate line of investigation or study during the period of performance; however, such direction or control will not interfere with the confidentiality and neutrality required of the Contractor during each phase of contract performance.

# CHAPTER 9 - NEGOTIATED RULEMAKING AT THE STATE LEVEL

The notion of consensus-building approaches to rulemaking at the state level is not new. As long ago as the turn of the century, consensus-building techniques were used to develop administrative agency awareness of, and responsiveness to, the interests of persons likely to be affected by various state rules. The agencies would convene various interested parties to get their advice and frequently would adopt their suggestions.

These practices have apparently developed irrespective of any savings that might result from avoidance of litigation over state regulations. Such litigation is relatively rare because of procedural safeguards such as legislative or executive oversight committees. Moreover, contesting of rules at the state level tends to be dealt with through political rather than legal means. Many of the approaches listed below have come to be considered normal administrative procedure. This experience supports the view that attempts to build a consensus for regulatory choices have benefits that go well beyond prospective savings from avoidance of litigation.

Use of negotiated rulemaking processes similar to the concept described in the *Sourcebook* has been reported in numerous states, primarily for resolving environmental disputes. Several states have also used a consensus-building technique referred to as a "policy dialogue" on a number of public policy issues. Participants in policy dialogues are not attempting to draft a proposed rule as in negotiated rulemaking, but are using a similar negotiating approach to identify issues and work cooperatively to resolve those issues. The degree of formality can vary with the particular circumstances, and state agencies have adapted the concept to their own needs.

Several state legislatures have considered reg-neg bills and a small number have enacted such legislation. In one state, reg-negs have been conducted under an executive order. The provisions in Montana, Nebraska, and New York are modeled on the federal Reg-Neg Act.

- Negotiated rulemaking is encouraged under amendments to the Idaho Administrative Procedure Act, Idaho Code 67-5206(3)(e) and 67-5220 (1993), which direct the attorney general to promulgate procedural rules to facilitate reg-neg.

- Indiana's Rules for Alternative Dispute Resolution, Burns Ind. ADR 1.1 (1994), list negotiated rulemaking as a "recognized" alternative dispute resolution method.

- Montana Negotiated Rulemaking Act of 1993, House Bill 317.

- Nebraska Negotiated Rulemaking Act (1994), R.R.S.Neb. §84-919.01 and §§84-921 to 84-932.

- In June 1992, New York Governor Mario Cuomo signed Executive Order No. 156, Establishing a Negotiated Rulemaking Program.

- Legislation enacted in Oklahoma in 1994, 74 O.S. §485 (HB 2446, §5), authorizes cabinet secretaries to make recommendations to the Oklahoma Advisory Committee on Intergovernmental Relations regarding federal regulatory actions that should be prepared using a negotiated rulemaking process.

- Statutory amendments in Washington in 1993 and 1994 provide for consideration of negotiated rulemaking and "pilot rulemaking" (chap. 34.05.310 (1) RCW).

## Negotiated Rulemaking Activity

- The Maine Department of Transportation used negotiated rulemaking to restructure the state's transportation planning process. After six months of negotiations, an advisory committee reached consensus on a draft regulation that was adopted without substantial change. (See J. W. Reitman and A. R. Gosline, *Transportation Planning Model for the Future: Maine's road from referendum to reform*, Consensus (No. 22), p. 1, Public Disputes Network, Harvard Program on Negotiation, April 1994.)

- In 1992, when New York Governor Mario Cuomo signed Executive Order No. 156 establishing a reg-neg program, the Department of Environmental Conservation was directed to conduct two reg-negs. These proceedings considered a rule to govern air emissions from dry cleaning facilities (see Kuwik, *Using the Negotiated Rule-making Process in New York--Lessons Learned and* *a View to the Future*, NY State Forum on Conflict & Consensus Newsletter, vol. 1, no. 2, p. 1, Government Law Center, Albany Law School, 1994) and a rule on notification requirements for the application of pesticides (see Lobel, *Negotiated Rulemaking in New York, Part II*, NY State Forum on Conflict & Consensus Newsletter, vol. 2, no. 1, p. 1, Government Law Center, Albany Law School, 1995). An earlier experience involved negotiation of regulations to control oil and gas wells in an area of western New York. (See Vessels, *Negotiated Rulemaking: A New York Success Story*, Negotiation Journal, vol. 3, no. 1, p. 53, January 1987.)

- In Massachusetts, a negotiated rulemaking process was used to draft regulations on access to marine facilities by disabled persons. (See S. R. Brown, *"Reg Neg" resolves disability access to marine facilities*, Consensus (no. 16), p. 1, Public Disputes Network, Harvard Program on Negotiation, October 1992.)

- The governors of eight states bordering the Great Lakes cooperated to initiate a negotiation process for standards and procedures to limit discharges into the lakes. (See J. B. Litwak, *"Reg neg" part of Great Lakes clean up*, Consensus (no. 15), p. 1, Public Disputes Network, Harvard Program on Negotiation, July 1992.)

- Arizona used negotiated rulemaking to increase public participation in development of new regulations establishing groundwater standards. (See *Short-Form Reg-Neg Used by Arizona*, 2 BNA ADR Report 71, March 3, 1988.)

- The Colorado Public Utilities Commission worked with interested parties to develop a rule for resource planning. (See NIDR Dispute Resolution Forum, January 1986.)

- New Mexico used reg-neg to help develop rules governing underground petroleum storage tanks. (See *New Mexico Is Negotiating Rule on Underground Storage Tanks*, 1 BNA ADR Report 260, October 29, 1987; *New Mexico Storage Tanks*, NIDR Dispute Resolution Forum, December 1987; *Negotiated Rulemaking on New Mexico's Underground Storage Tank Regulations*, Resolve (no. 21), p. 14, Conservation Foundation, 1989.)

- Two reg-negs were initiated in Virginia following "policy dialogues" with various state agencies on the development of groundwater strategies. One involved rules concerning well-drilling standards and, more recently, another involved broad groundwater standards. Each was organized by the Institute of Environmental

Negotiation of Charlottesville. (See *Interagency Policy Dialogue and Regulatory Negotiation Completed on Virginia's Groundwater Management Strategy*, Resolve (no. 20), p. 18, Conservation Foundation, 1988.)

- In Washington, an agreement was negotiated on the regulation of timber, fish, and wildlife. The agreement led to adoption of rule changes by the state's Department of Natural Resources. The negotiations were facilitated by the Northwest Renewable Resources Center. (See *Timber/Fish/Wildlife Agreement Reached in Washington State*, Resolve (no. 20), p. 15, Conservation Foundation, 1988.) Rules have also been negotiated to regulate the containment of pesticides and fertilizers. (See above for Washington's reg-neg legislation. See also Washington State Office of Financial Management, *A Guide to Public Involvement in Rule Making*, February 1995.)

- A new water antidegradation policy for the state of Idaho was negotiated by representatives of industry and conservation interests. The Northwest Renewable Resources Center acted as mediator. (See *Idaho Water Antidegradation Successfully Mediated*, 4 Northwest Renewable Resources Center Newsletter (no. 2), p. 1, Winter 1988; *Antidegradation Water Policy Mediated in Idaho*, Resolve (no. 21), p. 13, Conservation Foundation, 1989.)

### Examples of Policy Dialogues and Other Consensus-Building Efforts

- The National Council of State Dispute Resolution Programs was formed in September 1992 to promote communication and collaboration among governmental dispute resolution offices. The organization works to develop quality dispute resolution practices and to encourage the growth of new statewide offices of dispute resolution. (See C. Rule and W. S. Lee, *State public policy dispute resolution programs discuss expansion*, Consensus (no. 23), p. 2, Public Disputes Network, Harvard Program on Negotiation, July 1994.)

- The North Dakota Consensus Council has been successful in bringing leaders and other citizens together to build consensus in public education, local government, and the state judicial system. (See *Forging public policy consensus on the prairie*, Consensus (no. 17), p. 5, Public Disputes Network, Harvard Program on Negotiation, January 1993.)

- A Minnesota proceeding on the future of residential mental health facilities, with a view toward eventually phasing them out, involves the development of consensus agreements on the language of regulations or legislation. This procedure goes beyond policy making to involve both statutory changes and a budget proposal.

- The New Mexico Public Utility Commission brought together representatives of affected interests when it wanted to draft a plan to moderate the effect of sudden shocks in electric utility rates in response to the establishment of a new nuclear generating plant in that state.

- Administrators of a federally sponsored estuary research project asked users of Narragansett Bay, Rhode Island, to define and rank goals for the future of the bay. A report on goals was based on negotiations of 61 individuals who represented such diverse interests as commercial fishing and boating, recreation, environment, industry, regulatory agencies, the scientific community, and the public. (See *Goals for Narragansett Bay*, 1 BNA ADR Report 142, July 23, 1987.)

- The Tennessee Governor's Safe Growth Team, in developing a groundwater management strategy, asked the Conservation Foundation in 1986 to convene and facilitate a state-level policy dialogue. Participants included state agency staff, local governments, private industry, and environmental and public interest groups. (See *Tennessee Groundwater Policy Dialogue Is Completed*, Resolve (no. 19), p. 16, Conservation Foundation, 1988.)

- Policy dialogues have been used in Virginia to address hospital waste disposal standards and policy on low-level radioactive waste. (See Resolve (no. 19), pp. 17, 18, Conservation Foundation, 1988.)

- In Hawaii, representatives of various interests were brought together to negotiate a state water code. The agreement reached by the "Water Code Roundtable" led to adoption of state legislation and the establishment of an independent state water agency. (See *A Pacific paradise settles a hellish dispute over a scarce resource*, Consensus (no. 1), p. 1, Public Disputes Network, Harvard Program on Negotiation, November 1988.)

- As of mid-1995, state offices of dispute resolution have been established in at least the following states: Alabama, California, Florida, Hawaii, Maine, Massachusetts, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Texas, Vermont, Washington, and Wisconsin.

Several of these offices offer assistance in the resolution of regulatory and public policy disputes through consensus building approaches. (See, e.g., summaries of state office activities reported in NIDR News, vol. 2, Jan./Feb. and March/April 1995 issues.)

# CHAPTER 10 - FEDERAL AGENCY EXPERIENCE WITH NEGOTIATED RULEMAKING

The federal departments and agencies that have undertaken negotiated rulemaking are listed in alphabetical order. The negotiated rulemaking within the agency is identified according to the subject matter and is listed in chronological order of the use of the procedure. The table lists significant notices published through May 1995.

Department of Agriculture
Department of Education
Department of Energy (Federal Energy
  Regulatory Commission)*
Department of Health and Human Services
Department of Housing and Urban Development
Department of the Interior
Department of Labor
Department of Transportation
Environmental Protection Agency
Farm Credit Administration
Federal Communications Commission
Federal Trade Commission
Interstate Commerce Commission
Nuclear Regulatory Commission

## Department of Agriculture - Animal and Plant Health Inspection Service

### Interstate Spread of Varroa Mites

In April 1988, the Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) published an interim rule designed to prevent the interstate spread of Varroa mites, a parasite of honeybees. The rule was rescinded within one month because of substantial adverse comment. In November 1988, APHIS convened a committee to negotiate the terms of a new regulation. The committee included representatives of beekeepers, fruit growers, other related industry groups, and state and federal agencies. Two negotiation sessions were held in November-December 1988 and January 1989. In March 1989, the Department published a proposed rule based on the committee's consensus. However, after receiving public comments, the Department decided one month later to withdraw the proposed rule and "defer to the efforts of research, state government, and the beekeeping community itself."

Convenor: Deborah S. Dalton (EPA), (202) 382-5495. Facilitators: Louis Manchise (FMCS), (513) 684-2951; Deborah S. Dalton; and Emmett P. De Deyn (FMCS), (202) 653-5232.

Affirmation of Interim Rule, 53 Fed. Reg. 35425 (September 14, 1988)

Notice of Intent to Establish Committee, 53 Fed. Reg. 45134 (November 8, 1988)

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* The Federal Energy Regulatory Commission published a notice of intent to use negotiated rulemaking, but subsequently announced its decision not to go forward.

Notice of Meeting, 53 Fed. Reg. 45484 (November 10, 1988)

Notice of Meeting, 53 Fed. Reg. 50972 (December 19, 1988)

Notice of Proposed Rulemaking, 54 Fed. Reg. 10992 (March 16, 1989)

Withdrawal of Proposed Rule, 54 Fed. Reg. 15217 (April 17, 1989)

### Control of Scrapie

On February 26, 1990, APHIS announced its intent to establish an advisory committee to develop a proposed rule containing alternatives to the existing regulatory program for the control of scrapie, a disease of sheep and goats. The negotiating committee met eight times between May 1990 and January 1991, and reached consensus on the content and requirements of a program to reduce scrapie and control its spread. A proposed rule was published in July 1991, and a final rule in July 1992. At the same time, APHIS also proposed modification of its scrapie indemnification program for destruction of affected animals.

Convenor: Howard S. Bellman.

Notice of intent to establish advisory committee, 55 Fed. Reg. 6662 (February 26, 1990)

Notice of proposed rule, 56 Fed. Reg. 32342 (July 16, 1991)

Final rule, 57 Fed. Reg. 33625 (July 30, 1992)

Proposed rule, 57 Fed. Reg. 33656 (July 30, 1992)

### Marine Mammals

On May 22, 1995, the Department of Agriculture announced its intent to establish an advisory committee to negotiate revisions to the regulations governing the handling, care, treatment, and transport of marine mammals in captivity.

Notice of intent to establish advisory committee, 60 Fed. Reg. 27049 (May 22, 1995)

## Department of Education

### Financial Assistance to Meet Special Educational Needs of Children

The Hawkins-Stafford Elementary and Secondary School Improvement Amendments of 1988 (Pub. L. 100-297) was enacted on April 28, 1988. Chapter 1 addresses financial assistance to meet special educational needs of children. The Secretary of Education is authorized to issue regulations to ensure compliance with the requirements of the chapter. The new section 1431 (of the amended Elementary and Secondary Education Act of 1965) requires that such regulations must be developed in part through a "modified negotiated rulemaking process as a demonstration of such process." The negotiated rulemaking must be conducted so as to allow issuance of the final rules within 240 days from enactment (i.e., by December 24, 1988).

Section 1431 specifies:

> The modified process shall waive application of the Federal Advisory Committee Act, but shall otherwise follow the guidance provided in [sic] the

Administrative Conference of the United States in Recommendation 82-4 . . . and any successor regulation [sic].

The regulations are to result from a "three-step process" involving a series of regional meetings, followed by the reg-neg "on a minimum of 4 key issues," followed by the normal federal regulatory review and notice and comment procedures. The conference committee report states that the conferees will look at this process to see whether it produces regulations that are more clearly understood and widely supported than prior regulations.

The Department convened five regional meetings in May and June 1988 to discuss six main issues. The Department then prepared draft regulations on these issues, which served as the basis for a single negotiation session held on July 19-20, 1988. A notice of proposed rulemaking was published on October 21, 1988, reflecting the results of the negotiations. The final regulations were published on May 19, 1989.

Convenor: Mary Jean LeTendre, Director, Compensatory Education Programs, Department of Education (202) 732-4682. Facilitators: Daniel P. Dozier [then Legal Counsel, Federal Mediation and Conciliation Service]; Louis Manchise (FMCS), (513) 684-2951; Deborah S. Dalton (EPA), (202) 382-5495; and Chris Kirtz (EPA), (202) 382-7565.

Notice of Meeting to Conduct a Modified Negotiated Rulemaking Process, 53 Fed. Reg. 26214 (July 11, 1988)

Notice of Proposed Rulemaking, 53 Fed. Reg. 41466 (October 21, 1988)

Final Regulations, 54 Fed. Reg. 21752 (May 19, 1989)

### Carl D. Perkins Vocational and Applied Technology Act

The Carl D. Perkins Vocational and Applied Technology Education Act Amendments of 1990 (Public Law 101-392, 104 Stat. 753, §504) required the development and issuance of regulations through a process involving a series of regional meetings followed by negotiated rulemaking. Negotiations took place in a two-day session in December 1990. Final regulations were published in August 1992.

Facilitators: John Wagner, Peter Swanson, and Lynn Sylvester, Federal Mediation and Conciliation Service.

Notice of Proposed Rule, 56 Fed. Reg. 51448 (October 11, 1991)

Notice of meeting to conduct a negotiated rulemaking session, 55 Fed. Reg. 51304 (December 13, 1991).

Final regulations, 57 Fed. Reg. 36720 (August 14, 1992)

### Higher Education Amendments of 1992

For the third time, legislation was enacted requiring the Department of Education to use a procedure combining a series of regional meetings with a subsequent negotiated rulemaking. (Higher Education Amendments of 1992, Public Law 102-325, 106 Stat. 448, §497.) Four regional meetings were held in September 1992. Negotiations were begun in January 1993 by several committees, formed to address separate parts of the law.

Facilitators: Philip J. Harter, Howard S. Bellman, and Alana Knaster.

Notice of regional meetings, 57 Fed. Reg. 38639 (August 26, 1992)

Notice of proposed information collection requests, 57 Fed. Reg. 42986 (September 17, 1992)

Notice of meetings to conduct negotiated rulemakings, 57 Fed. Reg. 62533 (December 31, 1992)

Notice of additional meetings, 58 Fed. Reg. 25590 (April 27, 1993)

Notice of meeting to continue reg-neg, 58 Fed. Reg. 43608 (August 17, 1993)

Final rules, 59 Fed. Reg. 22062 (April 28, 1994), 59 Fed. Reg. 22250, 22348 (April 29, 1994), plus several additional Fed. Reg. notices.

### Direct Student Loan Regulations

On December 28, 1993, the Department of Education announced its intent to establish an advisory committee to develop proposed rules concerning direct student loans. The rules would implement in part the Student Loan Reform Act of 1993, part of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66. The negotiating committee met from January through July 1994. The Department reported that consensus was not attained on the entire notice of proposed rulemaking, but substantive agreement was reached on most of the issues the regulations addressed. The Department proposed a rule for the Federal Direct Student Loan Program based on the negotiated rulemaking.

Facilitators: Howard Bellman; Douglas Brookman, Brookman-King.

Notice of intent to establish advisory committee, 58 Fed. Reg. 68619 (December 28, 1993)

Notice of first meeting of the Direct Student Loan Regulations Negotiated Rulemaking Advisory Committee, 59 Fed. Reg. 2363 (January 14, 1994)

Notice of proposed rule, 59 Fed. Reg. 42646 (August 18, 1994)

Final rule, 59 Fed. Reg. 61664 (December 1, 1994)

### Guaranty Agency Reserves Regulations

On December 28, 1993, the Department of Education announced its intent to establish an advisory committee to develop a proposed rule concerning guaranty agency reserves regulations. The rules would implement in part the Student Loan Reform Act of 1993, part of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66. The committee met from January through June 1993, reaching consensus on a proposed rule.

Facilitators: Howard Bellman; Douglas Brookman, Brookman-King.

Notice of intent to establish advisory committee, 58 Fed. Reg. 68619 (December 28, 1993)

Notice of first meeting of the Guaranty Agency Reserves Negotiated Rulemaking Advisory Committee, 59 Fed. Reg. 2787 (January 19, 1994)

Notice of proposed rule, 59 Fed. Reg. 41184 (August 10, 1994)

Final rule, 59 Fed. Reg. 60688 (November 25, 1994)

### Helping Disadvantaged Students Meet High Standards

On October 28, 1994, the Department of Education requested advice and recommendations on regulatory issues under Title I programs. Following receipt of responses, the Secretary submitted policy options on two key issues to a negotiated rulemaking process in accordance with section 1601(b) of Title I. Two negotiation sessions were held in January 1995. Consensus was reached on a majority of the issues.

Request for advice and recommendations, 59 Fed. Reg. 54372 (October 28, 1994)

Notice of proposed rule, 60 Fed. Reg. 21400 (May 1, 1995)

### Borrower Defenses Regulations

The Department of Education's Borrower Defenses Regulations Negotiated Rulemaking Committee was formed to negotiate regulations on which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan under various loan programs, and the consequences of such defenses.

Notice of intent to establish committee, 60 Fed. Reg. 11004 (February 28, 1995)

Notice of meeting, 60 Fed. Reg. 15737 (March 27, 1995)

## Department of Energy - Federal Energy Regulatory Commission

### Ex Parte Regulations

In a notice of final rule of regulations governing submittal of proposed hydropower license conditions and other matters (56 Fed. Reg. 23108, May 20, 1991) the Commission stated that it had recently begun a comprehensive review of its ex parte regulations and that it hoped to revise the rules through negotiated rulemaking by the end of 1991. On December 19, 1991, FERC published a notice of intent to establish a negotiated rulemaking procedure. After receiving the comments and applications for membership on the committee, the Commission decided not to proceed with the negotiated rulemaking committee.

Notice of intent to establish a negotiated rulemaking committee, 56 Fed. Reg. 65863 (December 19, 1991)

Notice of decision not to establish a negotiated rulemaking committee, 57 Fed. Reg. 10621 (March 27, 1992)

## Department of Health and Human Services -- Health Care Financing Administration

### Revision of Wage Index for Medicare Reimbursement

In the first negotiated rulemaking by the Department of Health and Human Services, a negotiating committee reached consensus on the wage index used to adjust payment rates for hospice services under the Medicare program.

Convenor/Facilitator: Judy Ballard, Departmental Appeals Board, HHS.

Notice of intent to establish advisory committee, 59 Fed. Reg. 52129 (October 14, 1994)

Notice of establishment of advisory committee, 59 Fed. Reg. 67264 (December 29, 1994)

## Department of Health and Human Services - Indian Health Service (with Bureau of Indian Affairs)

### Indian Self-Determination

The Department of the Interior and the Department of Health and Human Services jointly established an advisory committee to negotiate regulations under the process required by the Indian Self-Determination Contract Reform Act of 1994, Pub. L. No. 103-413, Title I.

Facilitators: Jan Sunoo, Beverly Reinhart, and Peter Swanson, Federal Mediation and Conciliation Service.

Notice of intent to establish advisory committee, 59 Fed. Reg. 67592 (December 29, 1994)

Notice of Meeting, 60 Fed. Reg. 14582 (March 17, 1995)

## Department of Housing and Urban Development

### Operating Subsidies for Vacant Public Housing Units

The Department of Housing and Urban Development's first negotiated rulemaking addressed changes in the method of determining payment of operating subsidies for vacant public housing units. The Housing and Community Development Act of 1992, Pub. L. No. 102-550, §114(b) specified using reg-neg for this purpose. The committee reached consensus on a proposed rule.

Convenors/Facilitators: Ira Lobel and Thomas Putnam, Federal Mediation and Conciliation Service

Notice of intent to establish advisory committee, 60 Fed. Reg. 304 (January 3, 1995)

Notice of establishment of advisory committee, 60 Fed. Reg. 10339 (February 24, 1995)

## Department of the Interior - Bureau of Indian Affairs (with Indian Health Service)

### Indian Self-Determination

The Department of the Interior and the Department of Health and Human Services jointly established an advisory committee to negotiate regulations under the process required by the Indian Self-Determination Contract Reform Act of 1994, Pub. L. No. 103-413, Title I.

Facilitators: Jan Sunoo, Beverly Reinhart, and Peter Swanson, Federal Mediation and Conciliation Service.

Notice of intent to establish advisory committee, 59 Fed. Reg. 67592 (December 29, 1994)

Notice of Meeting, 60 Fed. Reg. 14582 (March 17, 1995)

## Department of the Interior - Minerals Management Service

### Air Quality Regulations for the California Outer Continental Shelf

The Minerals Management Service of the Department of the Interior formed a committee to discuss proposed air quality regulations for oil and gas exploration, production, and development for the outer continental shelf off the coast of California. This process was initiated as part of the settlement discussions in the litigation challenging the Department's regulations. Negotiations began in September 1986 and continued through 1988. In January 1989, the Department published a notice of proposed rulemaking in which it stated that the negotiations had served as many of the intended purposes as possible, and that it was time to broaden the public dialogue. The Department noted that, although the negotiations had not produced a consensus, much was accomplished during the two years of discussions.

Convenors: Alana Knaster and Gerald W. Cormick, The Mediation Institute. Facilitators: Philip J. Harter, Alana Knaster, and Gerald W. Cormick.

Advance Notice of Proposed Rulemaking, 50 Fed. Reg. 838 (January 7, 1985)

Notice of Proposed Rulemaking, 54 Fed. Reg. 1846 (January 17, 1989)

Notice of Proposed Technical Determinations, 54 Fed. Reg. 1870 (January 17, 1989)

### Federal Gas Valuation

The Minerals Management Service formed a committee to negotiate regulations for federal gas valuation under the Oil and Gas Royalty Management Act of 1982.

Notice of establishment of advisory committee, 59 Fed. Reg. 32943 (June 27, 1994)

### Gas Valuation on Indian Lands

The Department of the Interior established a committee to negotiate a proposed rule concerning gas valuation on Indian lands, pursuant to the Federal Oil and Gas Royalty Management Act of 1982.

Notice of establishment of advisory committee, 60 Fed. Reg. 7152 (February 7, 1995)

## Department of the Interior - Bureau of Land Management

### Paleontology; Fossil Collection on Federal Lands

On August 17, 1982, the Bureau of Land Management published a proposed rulemaking on the collection of geological and hobby materials on public lands. Due to the concerns expressed in a great number of comment letters, the Bureau deferred action on a final rulemaking until the issues could be discussed further. In 1989, the Bureau decided to use negotiated rulemaking. Negotiations were completed early in 1990.

Convenors/Facilitators: Christopher Moore and Mary Margaret Golten, CDR Associates.

Notice of a negotiated rulemaking, 54 Fed. Reg. 48647 (November 29, 1989)

## Department of the Interior - Office of Self-Governance

### Tribal Self-Governance

The Department of the Interior established a committee to negotiate and develop a proposed rule implementing the Tribal Self-Governance Act of 1994, Public Law 103-413, Title II, under the process required by §407 of that Act.

Notice of intent to establish a committee, 60 Fed. Reg. 8806 (February 15, 1995)

## Department of the Interior - Office of Surface Mining Reclamation and Enforcement

### Coal Refuse Disposal

The Secretary of the Interior established a committee to provide a forum to discuss a variety of regulatory and reclamation issues of concern to the public.

Notice establishing committee, 60 Fed. Reg. 13858 (March 14, 1995)

## Department of Labor - Occupational Safety and Health Administration

### Occupational Exposure to Benzene

Negotiations on a proposed standard for worker exposure to benzene took place from mid-1983 until reaching an impasse in late summer 1984. The negotiations did not result directly in a draft rule, but did serve to narrow the issues in a useful manner.

Convenors/Mediators: Gerald W. Cormick and Philip J. Harter.

Request for Information and Regulatory Schedule, 48 Fed. Reg. 31412 (July 8, 1983).

Proposed Rule and Notice of Hearing, 50 Fed. Reg. 50512 (December 10, 1985)

Final Rule, 52 Fed. Reg. 34460 (September 11, 1987)

### Occupational Exposure to 4,4'-Methylenedianiline (MDA)

OSHA convened in July 1986 a committee to negotiate a proposed rule on worker exposure to MDA, an animal carcinogen used in the manufacture of plastics. The committee submitted a set of recommendations that were published by the agency in July 1987. The agency drafted a proposed rule based on these recommendations, which was submitted to the Office of Management and Budget for review prior to publication. OSHA published the proposed rule in May 1989. The final rule was published on August 10, 1992.

Mediator: James R. Williams, Federal Mediation and Conciliation Service.

Notice of Intent to Form Negotiated Rulemaking Advisory Committee to Develop a Proposed Rule: Request for Representation, 50 Fed. Reg. 42789 (October 22, 1985)

Press Release, USDL 85-450 (October 22, 1985)

Extension of Time for Comments and Requests for Membership on Negotiating Committee, 50 Fed. Reg. 48655 (November 26, 1985)

Press Release, USDL 86-245 (June 10, 1986)

Appointment of Members to the MDA Negotiated Rulemaking Advisory Committee and Notice of Meeting, 51 Fed. Reg. 24452 (July 3, 1986)

Publication of Advisory Committee Recommendations, 52 Fed. Reg. 26776 (July 16, 1987)

Notice of Proposed Rulemaking, 54 Fed. Reg. 20672 (May 12, 1989)

Final rule, 57 Fed. Reg. 35630 (August 10, 1992)

### Safety Standards for Erection of Steel Structures

In December 1992, OSHA announced its intention to undertake negotiated rulemaking to consider revising the safety requirements for workers engaged in the erection of structures made of steel and possibly other materials. The committee was formed early in 1994. The steel erection reg-neg is the first to make use of an electronic bulletin board for communications among committee members and between the committee and the general public.

Convenor/Facilitator: Philip J. Harter.

Announcement of Intent to Establish Negotiated Rulemaking Committee; Request for Representation, 57 Fed. Reg. 61860 (December 29, 1992)

Notice of establishment of Negotiated Rulemaking Committee, 59 Fed. Reg. 24389 (May 11, 1994)

Notice of public meeting; appointment of members to advisory committee; and organizational meeting of advisory committee, 59 Fed. Reg. 25848, 26153 (May 18 & 19, 1994)

Notice of meeting and agenda, 59 Fed. Reg. 32943 (June 27, 1994)

Notice of meetings and agendas, 59 Fed. Reg. 37951 (July 26, 1994)

## Department of Transportation - Federal Aviation Administration

### Flight Time Limitations and Rest Requirements for Flight Crewmembers in Air Transportation

The first agency to start, and to complete, a negotiated rulemaking proceeding was the FAA. A committee was convened to negotiate a revision of flight and rest time requirements for domestic airline pilots. The existing rules had been in effect for approximately 30 years and were substantially outmoded, causing FAA to issue more than 1000 pages of interpretations. On several previous occasions, the agency had made proposals for revising the rules, but withdrew them because of substantial opposition. Representatives of airlines, pilot organizations, public interest groups, and other interested parties met from June 29 to September 26, 1983, with an additional meeting on February 14, 1984, to discuss the proposed rule, and a meeting on September 11, 1984, after the public comment period on the proposed rule. FAA published a notice of proposed rulemaking based on the negotiations in March 1984 and a final rule in July 1985, effective October 1, 1985.

Convenor/Mediator: Nicholas A. Fidandis [then Director, Mediation Services, Federal Mediation and Conciliation Service].

Press Release (FAA 13-83), March 24, 1983

Notice of Intent to Form Advisory Committee for Regulatory Negotiation, 48 Fed. Reg. 21339 (May 12, 1983)

Notice of Establishment of Advisory Committee for Regulatory Negotiation and Notice of First Meeting, 48 Fed. Reg. 29771 (June 28, 1983)

Notice of Proposed Rulemaking, 49 Fed. Reg. 12136 (March 28, 1984)

Press Release (FAA 46-84), (March 29, 1984)

Final Rule, 50 Fed. Reg. 29306 (July 18, 1985); effective October 1, 1985

Press Release (FAA 31-85), (July 24, 1985)

## Department of Transportation - Office of the Secretary

### Nondiscrimination on the Basis of Handicap in Air Travel

The Department of Transportation convened an advisory committee to negotiate a proposed rule concerning nondiscrimination on the basis of handicap in air travel, implementing the Air Carrier Access Act of 1986. In June 1988, DOT published a notice of proposed rulemaking based largely upon the results of the negotiations. According to the NPRM, the committee met from June to November 1987, tentatively agreeing on a substantial number of issues and producing proposed consensus recommendations for regulatory language on those points. However, the negotiations were not completed because of an impasse over the issue of exit row restrictions. DOT subsequently published a package of five rulemaking documents, including a final rule containing general and administrative provisions, plus provisions concerning physical facilities and services for passengers with disabilities, and notices seeking additional information on certain issues. The rule is based largely on the results of the negotiations held in 1987.

Convenor/Mediator: Eileen Hoffman, Federal Mediation and Conciliation Service.

Notice of Intent to Form Advisory Committee for Regulatory Negotiation, 52 Fed. Reg. 5467 (February 23, 1987)

Notice of Establishment of Advisory Committee for Regulatory Negotiation and Notice of First Meeting, 52 Fed. Reg. 19881 (May 28, 1987)

Notice of Proposed Rulemaking, 53 Fed. Reg. 23574 (June 22, 1988)

Notice of Extension of Comment Period, 53 Fed. Reg. 36997 (September 23, 1988)

Final Rule, 55 Fed. Reg. 8008 (March 6, 1990)

Supplemental Notice of Proposed Rulemaking, 55 Fed. Reg. 8076 (March 6, 1990)

Advance Notice of Proposed Rulemaking, 55 Fed. Reg. 8078 (March 6, 1990)

## Department of Transportation - National Highway Traffic Safety Administration; Federal Highway Administration

### Uniform System for Handicapped Parking

Under Public Law 100-641, the Department of Transportation is required to issue regulations that will establish a uniform system for parking by handicapped persons and that will encourage adoption of the system by each state. The legislative history indicates an expectation that negotiated rulemaking would be used to draft the proposed rule. (See 134 Cong. Rec. S 16951, October 20, 1988.) The Federal Highway Administration and the National Highway Traffic Safety Administration announced in June 1989 their intention to establish a committee for this purpose. The advisory committee met for six sessions and on March 23 1990 the FHWA and the NHTSA published a Notice of Proposed Rulemaking which adopted the committees recommended rule.

Notice of intent to form advisory committee for regulatory negotiation, 54 Fed. Reg. 24908 (June 12, 1989)

Notice of charter for the committee and membership and first meeting date, 56 Fed. Reg. 40770 (October 3, 1989).

Final rule, 56 Fed. Reg. 10329 (March 11, 1991).

### Headlight Aiming

On June 9, 1995, the National Highway Traffic Safety Administration proposed to establish an advisory committee to negotiate recommended specifications for altering headlamp beam patterns.

Facilitator: Lynn Sylvester, Federal Mediation and Conciliation Service

Notice of intent to establish advisory committee, 60 Fed. Reg. 30506 (June 9, 1995)

Notice of establishment of advisory committee, 60 Fed. Reg. 36253 (July 14, 1995)

## Department of Transportation - Coast Guard

### Oil Spill Vessel Response Plans

In January 1992, the United States Coast Guard established a committee to negotiate a rule on oil spill response plans to implement requirements of the Oil Pollution Act of 1990. The Act required a final rule to be issued by August 18, 1992. A consensus was reached on various issues in March 1992. A proposed rule on vessel response plans was published on June 19, and the committee reconvened in August 1992 to consider public comments. A second proposed rule based in part on the negotiations was published on September 29, addressing discharge removal equipment for vessels carrying oil. An interim final rule was published on February 5, 1993.

Convenor/Facilitator: Philip J. Harter.

Notice of intent to form a negotiated rulemaking committee, 56 Fed. Reg. 58202 (November 18, 1991)

Notice of establishment of committee, 57 Fed. Reg. 1139 (January 10, 1992)

Notice of proposed rulemaking, 57 Fed. Reg. 27514 (June 19, 1992)

Status of development of response plans, 57 Fed. Reg. 37920 (August 21, 1992)

Notice of proposed rulemaking, 57 Fed. Reg. 44912 (September 29, 1992)

Interim final rule, 58 Fed. Reg. 7376 (February 5, 1993)

### Chicago Drawbridge Regulations

The Coast Guard established an advisory committee to negotiate regulations governing the operation of drawbridges over the Chicago River for the passage of recreational vessels.

Facilitator: Howard S. Bellman.

Notice of intent to form advisory committee, 60 Fed. Reg. 18061 (April 10, 1995)

Notice of establishment of committee and first meeting, 60 Fed. Reg. 26710 (May 18, 1995)

## Department of Transportation - Office of the Secretary

### Transportation for Individuals with Disabilities

The Department of Transportation, in January 1991, chartered a committee to give advice on provisions of proposed and final rules implementing the Americans with Disabilities Act of 1990, Pub. L. No. 101-336. The group consisted of representatives of the transit industry and disability organizations. While not specifically chartered as a negotiated rulemaking committee, the group provided advice and approached an informal consensus on several issues.

Notice of Proposed Rulemaking, 56 Fed. Reg. 13856, (April 4, 1991)

Final Rule, 56 Fed. Reg. 45584 (September 6, 1991)

## Department of Transportation - Federal Railroad Administration

### Roadway Worker Protection

On August 17, 1994, the Federal Railroad Administration published a proposal to form an advisory committee that would negotiate a rule concerning the protection of railroad roadway workers.

Convenors/Facilitators: Scott Beckenbaugh and Jim Foss, Federal Mediation and Conciliation Service.

Notice of Proposal to Form a Negotiated Rulemaking Advisory Committee and Request for Representation, 59 Fed. Reg. 42200 (August 17, 1994)

Notice of establishment and first meeting, 60 Fed. Reg. 1761 (January 5, 1995)

## Environmental Protection Agency

Establishment of EPA's Regulatory Negotiation Project, 48 Fed. Reg. 7494 (February 22, 1983). Responses are summarized at 49 Fed. Reg. 17579 (April 24, 1984).

Candidates for Regulatory Negotiation, 53 Fed. Reg. 51003 (December 19, 1988). Thirty day response period extended to ninety days, 54 Fed. Reg. 2226 (January 19, 1989).

### Nonconformance Penalties under §206(g) of the Clean Air Act

Section 206(g) of the Clean Air Act, 42 U.S.C. §7525(g), requires EPA to issue a certificate of conformity for any class of heavy-duty vehicles or engines which exceed certain emissions standards, but which do not exceed an upper limit associated with that standard, provided the manufacturer pays a monetary penalty for nonconformance. EPA's negotiated rule implemented this statutory provision by specifying criteria for the availability of penalties, the method of establishing upper limits, a testing program, and a penalty formula. A rule was successfully negotiated by a committee that met from June 14, 1984 to October 12, 1984.

Convenor/Facilitator: John A. S. McGlennon, ERM-McGlennon Associates, Inc.

Intent to Form Advisory Committee to Negotiate Nonconformance Penalty Regulations, 49 Fed. Reg. 17576 (April 24, 1984)

Notice of Proposed Rulemaking, 50 Fed. Reg. 9204 (March 6, 1985)

Final Rule, 50 Fed. Reg. 35374 (August 30, 1985); effective September 30, 1985

### Emergency Pesticide Exemptions under Section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act

Section 18 of FIFRA gives the EPA Administrator authority, at his discretion, to exempt any federal or state agency from any provision of the Act if he determines that emergency conditions exist that warrant an exemption. A rule was successfully negotiated that revised the criteria and procedures for emergency exemptions adopted in 1973. The negotiating committee met for four months starting on September 28, 1984.

Convenor: John A. S. McGlennon, ERM-McGlennon Associates, Inc. Facilitator: LaJuana Wilcher [then Special Assistant, Office of the General Counsel, EPA].

Intent to Form an Advisory Committee, 49 Fed. Reg. 31145 (August 3, 1984)

Notice of Proposed Rulemaking, 50 Fed. Reg. 13944 (April 8, 1985)

Final Rule, 51 Fed. Reg. 1896 (January 15, 1986)

## Worker Protection Standards for Agricultural Pesticides

EPA proposed to revise its regulations governing worker protection from agricultural pesticides. Meetings of a negotiating committee began on November 4, 1985. In February 1986, members representing farmworkers decided to discontinue their participation in the negotiation process. The remainder of the committee continued to meet and to work with EPA until June 10, 1986, but in light of the absence of one significantly affected interest, a consensus could not be reached.

EPA subsequently issued a notice of proposed rulemaking, which stated: "Although a consensus on this rule was not achieved, Committee members representing the broad interests affected by this proposal discussed issues and regulatory language and helped shape the proposed regulation. EPA . . . firmly believes that the Committee's deliberations sharpened the issues and will enhance future public discussions generated by this proposal."

Facilitator: Philip J. Harter.

Intent to Form an Advisory Committee to Negotiate Proposed Farmworker Protection Standards for Agricultural Pesticides, 50 Fed. Reg. 38030 (September 19, 1985)

Establishment of Committee, 50 Fed. Reg. 42223 (October 18, 1985)

Notice of Proposed Rulemaking, 53 Fed. Reg. 25970 (July 8, 1988)

## New Source Performance Standards for Woodburning Stoves

EPA has adopted a rule setting performance standards for residential woodburning stoves. The standards implement section 111 of the Clean Air Act. They limit emissions of particulate matter from newly manufactured units.

The rule is based on a consensus reached by a negotiating committee that included representatives of the wood heater industry, the environmental community, consumer groups, state air pollution control and energy agencies, and EPA. The committee met from March 19 to August 21, 1986.

Convenor: Philip J. Harter. Facilitators: Philip J. Harter and Allan Hirsch (EPA).

Advance Notice of Proposed Rulemaking, 50 Fed. Reg. 31504 (August 2, 1985)

Intent to Form an Advisory Committee to Negotiate New Source Performance Standards for Residential Wood Combustion Units, 51 Fed. Reg. 4800 (February 7, 1986)

New Source Performance Standards for Residential Wood Combustion Units Negotiated Rulemaking Advisory Committee; Establishment and Open Meeting, 51 Fed. Reg. 8241 (March 10, 1986)

Notice of Results of Rulemaking Negotiation, 51 Fed. Reg. 34672 (September 30, 1986)

Notice of Proposed Rulemaking and Public Hearing, 52 Fed. Reg. 4994 (February 18, 1987)

Final Rule, 53 Fed. Reg. 5860 (February 26, 1988)

## Resource Conservation and Recovery Act Permit Modifications

EPA convened a committee to negotiate modifications to Resource Conservation and Recovery Act permits for hazardous waste management. Negotiations took place from September 10, 1986 to February 24, 1987, with 18 of the 19 negotiators signing an agreement in principle that was used as the basis for a proposed rule.

Facilitators: John A. S. McGlennon and Peter Schneider, ERM-McGlennon Associates, Inc.

Intent to Form an Advisory Committee to Negotiate Regulations Governing Major and Minor Modifications of RCRA Permits, 51 Fed. Reg. 25739 (July 16, 1986)

Establishment of Committee, 51 Fed. Reg. 30911 (August 29, 1986)

Notice of Proposed Rulemaking, 52 Fed. Reg. 35838 (September 23, 1987)

Correction Notice and Extension of Comment Period, 52 Fed. Reg. 44153 (November 18, 1987)

Final Rule, 53 Fed. Reg. 37912 (September 28, 1988)

## Underground Injection of Hazardous Wastes

EPA convened a committee to negotiate a rule that would implement statutory prohibitions on the underground injection of hazardous wastes (Hazardous and Solid Waste Amendments of 1984). The committee included representatives of industry, environmental and public interest groups, state agencies, and EPA. They met for six months, beginning on September 16, 1986.

EPA subsequently published a notice of proposed rulemaking, which stated: "Despite substantial agreement on a number of issues and approaches, the group was unsuccessful in generating a draft rule which they could all agree should be used as the basis of the proposal. Notwithstanding this lack of full consensus, as EPA felt they represented the soundest approach, many of the provisions of this proposal reflect the thinking of the negotiating Committee; and today's proposal is substantially similar to the Committee's last draft in many regards."

EPA issued a final rule in July 1988. A lawsuit challenging the substance of the final rule was filed in the D.C. Circuit by environmental and industry groups. The court scheduled oral argument for February 1990. The U.S. Court of Appeals for the D.C. Circuit affirmed EPA's rule with no mention of the rulemaking process, *Natural Resources Defense Council v. EPA*, 907 F.2d 1146 (D.C. Cir. 1990).

Convenor: John A. S. McGlennon, ERM-McGlennon Associates, Inc. Facilitators: Philip J. Harter; Gail Bingham, Conservation Foundation (RESOLVE).

Intent to Form an Advisory Committee to Negotiate Hazardous Waste Injection Restrictions Mandated by the Hazardous and Solid Waste Amendments of 1984, 51 Fed. Reg. 25401 (July 14, 1986)

Establishment of Committee, 51 Fed. Reg. 30911 (August 29, 1986)

Notice of Proposed Rulemaking, 52 Fed. Reg. 32446 (August 27, 1987)

Final Rule, 53 Fed. Reg. 28118 (July 26, 1988)

## Asbestos-Containing Materials in Schools

EPA was required under the Asbestos Hazard Emergency Response Act of 1986, Pub. L. No. 99-519, to issue a final rule by October 17, 1987, on inspection and abatement of asbestos-containing materials in school buildings.

An advisory committee was formed to negotiate a proposed rule within a period of a few months. Meetings ran from January 23 to April 3, 1987. Twenty of the 24 interests represented on the committee ultimately signed a set of statements supporting the use of agreed-on portions of proposed regulatory language. EPA then published a proposed rule based on the negotiations, and on October 30, 1987, published a final rule, to be effective December 14, 1987.

The final rule was the first reg-neg rule to be challenged in court. The suit was brought by the Safe Buildings Alliance, a group representing former manufacturers of asbestos building products that are now illegal. Plaintiffs in the lawsuit claimed that the rule would encourage unnecessary removal of materials from buildings and would result in a chaotic situation. They sought a more objective standard -- based on air monitoring, for example -- rather than the professional judgment called for under EPA's rule. The Safe Buildings Alliance was represented on the negotiating committee. Several other parties who were represented on the negotiating committee intervened in support of the final rule as published. These included the National Education Association, the American Association of School Administrators, and a group of state attorneys general.

In May 1988, the rule was upheld by the U.S. Court of Appeals for the D.C. Circuit, *Safe Buildings Alliance v. EPA*, 846 F.2d 79 (D.C. Cir. 1988). The court determined that EPA's regulation embodied a reasonable interpretation of the requirements of the Asbestos Hazard Emergency Response Act of 1986, Pub. L. No. 99-519, 15 USC §§2641-54. Neither the appeal nor the court's decision referred to the negotiation procedure that was followed. EPA maintains that the scope of the litigation was greatly curtailed in scope as a result of the negotiation process.

Convenors: Susan L. Carpenter; Kathy Tyson (EPA). Facilitators: Owen Olpin, O'Melveny & Myers; Eileen B. Hoffman, Daniel Dozier, and John Wagner, Federal Mediation and Conciliation Service; Leah Haygood, Conservation Foundation.

Consideration of Establishing an Advisory Committee to Negotiate Proposed Regulations Implementing the Asbestos Hazard Emergency Response Act of 1986, 52 Fed. Reg. 1377 (January 13, 1987)

Notice of Proposed Rulemaking, 52 Fed. Reg. 15820 (April 30, 1987)

Notice of Public Hearing, 52 Fed. Reg. 29228 (August 6, 1987)

Final Rule, 52 Fed. Reg. 41826 (October 30, 1987)

## Control of Volatile Organic Chemical Equipment Leaks

In April 1989, EPA announced that it was considering whether to establish an advisory committee to negotiate a new approach for regulation of equipment leaks under sections 111 and 112 of the Clean Air Act. EPA's Federal Register notice included a list of key issues and a list of interests and parties identified as possible participants. The committee was chartered in September 1989 and met for a period of 12 months. Consensus was reached in October 1990, and the consensus draft of the rule was published in March 1991.

Convenor/Facilitator: Philip J. Harter.

Intent to Form an Advisory Committee to Negotiate a New Approach for Control of Volatile Organic Chemical Equipment Leaks, 54 Fed. Reg. 17944 (April 25, 1989)

Notice of agreement on negotiated rule, 56 Fed. Reg. 9315 (March 6, 1991)

Proposed rule and notice of public hearing, 57 Fed. Reg. 62608 (December 31, 1992)

### Recycling of Lead Acid Batteries

Automotive, telecommunications and standby power batteries containing lead are a significant source of lead contamination if not disposed of properly. The rule seeks to increase the level of those batteries recycled to 100 percent.

EPA chartered a negotiated rulemaking advisory committee in December 1990, composed of representatives of the battery manufacturing, scrap collection, and recycling industries, primary and secondary lead smelters, battery retailers, environmentalists, and state and local governments. The committee met every two weeks from January through April 1991. In May, meetings were suspended pending EPA development of additional risk and cost information. The agency met with the committee in September 1991 after reviewing the risk and cost information, and announced that the risk/benefits did not adequately justify the cost of regulating at that time under requirements of the Toxic Substances Control Act. The committee has been adjourned.

Convenors/Facilitators: John A. S. McGlennon and Peter Schneider, ERM-New England, Inc.

Notice of the establishment and open meeting of advisory committee to negotiate a rule to regulate the recycling of lead acid batteries, 56 Fed. Reg. 2885 (January 25, 1991)

### Clean Fuels (Oxygenated and Reformulated Fuels)

EPA established a committee to negotiate regulations for oxygenated and reformulated fuels pursuant to the 1990 amendments to the Clean Air Act. The committee had its first meeting on March 13, 1991. The 28 members included domestic and imported auto manufacturers, small and large oil companies, the environmental farmer and citizens group, gasoline marketers, methanol and ethanol producers, state and local air pollution control organizations, and the Department of Energy. The committee met in either full session or in four smaller working groups almost every two weeks. Agreement was reached and was widely hailed as a "milestone in reconciling the automobile with environmental quality through cleaner fuels." (Environmental News, August 16, 1991). However, the rules ultimately adopted by the Bush and Clinton Administrations differed from the negotiated rule. The final rule was rejected in 1995 by the D.C. Circuit, *American Petroleum Institute v. EPA*, 52 F.3d 1113 (D.C. Cir. 1995).

Convenors/Facilitators: Philip J. Harter; Alana Knaster, The Mediation Institute.

Notice of intent to form a negotiated rulemaking committee and announcement of public meeting, 56 Fed. Reg. 5167 (February 8, 1991)

Notice of establishment of negotiated rulemaking committee 56 Fed. Reg. 10522 (March 13, 1991)

Notice of hearing to discuss proposed rules 56 Fed. Reg. 29919 (July 1, 1991)

Notice of proposed rulemaking, 57 Fed Reg 31176 (July 9, 1991)

Supplemental notice of proposed guidelines, 57 Fed Reg. 4408 (February 5, 1992)

Notice of application for extension of the reformulated gasoline program to New Jersey, Delaware and Maryland, 57 Fed. Reg. 11218 (April 1, 1992)

Supplemental notice of proposed rulemaking, 57 Fed. Reg. 13416 (April 16, 1992)

Notice of application for extension of the Reformulated Gasoline Program to the District of Columbia, 57 Fed. Reg. 24037, (June 5, 1992)

Notice of availability of guidance documents, 57 Fed. Reg. 47853 (October 20, 1992); see also 57 Fed. Reg. 47769, 47849 (October 20, 1992)

Final rule, 59 Fed. Reg. 7716 (February 16, 1994)

### Underground Injection Control, Class II Wells

EPA considered establishing a committee to negotiate rules under the Safe Drinking Water Act, pertaining to underground injection control associated with oil and gas production. The agency subsequently decided not to go forward with negotiations, but did form a committee to give advice on options.

Convenors/Facilitators: Philip J. Harter and John Lingelbach.

Request for comments, 56 Fed. Reg. 4957 (February 7, 1991)

Notice of public meeting, 56 Fed. Reg. 14521 (April 10, 1991)

Establishment of FACA committee, 56 Fed. Reg. 26672 (June 10, 1991)

### National Emission Standards for Coke Oven Batteries

The Clean Air Act Amendments of 1990 require EPA to issue national emission standards for coke oven batteries by December 31, 1992. Section 112 specifically charges EPA with reducing the adverse affects of hazardous air pollutants from new and existing sources, among other things.

After a series of individual and group meetings with interested parties, EPA decided to charter an advisory committee that included representatives of environmental and public interests, major steel companies, utilities, the relevant coke oven batteries, the association of state implementation officials, and union representatives. The Clean Air Act Amendments of 1990 required issuance of standards by December 31, 1992. The committee conducted its first formal meeting on February 5 and 6, 1992, and continued to meet at 3-week intervals, eventually reaching consensus on a proposed rule.

Facilitator: Philip Harter.

Notice of establishment of advisory committee and notice of open meeting, 57 Fed. Reg. 1730 (January 15, 1992)

Proposed rule and notice of public hearing, 57 Fed. Reg. 57534 (December 4, 1992)

Final rule, 58 Fed. Reg. 57898 (October 27, 1993)

## Hazardous Waste Manifests

The Resource Conservation and Recovery Act (RCRA) requires EPA to establish requirements for a manifest document that will record the movement of hazardous waste from its point of origin to its final destination at a treatment, storage or disposal site. EPA regulations specify the minimum data needed on the manifest. Since states are allowed to request additional data, considerable variation in both manifest formats and procedures has developed, making retrieval and dissemination of manifest information difficult.

The Association of State and Territorial Solid Waste Management Officials (ASTSWMO) petitioned EPA in January 1990 to revise and standardize the manifest. In July 1992, EPA decided to conduct a regulatory negotiation based on this petition. Parties to the negotiation include states, generators, transporters, disposal facilities, unions and environmental groups. The committee's organizational meeting took place on July 28, 1992. The negotiation began in October 1992. EPA's original deadline of April, 1993 was extended to December 1993. The negotiation ended successfully.

Convenor/Facilitator: Suzanne Orenstein, RESOLVE (formerly The Conservation Foundation).

Notice of Intent to form a negotiated rulemaking advisory committee under the Federal Advisory Committee Act, 57 Fed. Reg. 24765 (June 11, 1992)

Establishment of Federal Advisory Committee Act committee and meeting announcement, 57 Fed. Reg. 54203 (November 17, 1992)

## Disinfectant Byproducts in Drinking Water

On September 15, 1992, EPA announced its intent to form a committee to negotiate a proposed rule on contamination of drinking water by disinfectant byproducts. The negotiations led to publication of three proposed rules, which addressed information collection, disinfectant byproducts in water, and enhanced surface water treatment.

The Safe Drinking Water Act requires disinfection of tap water to reduce acute health risks from microbial contamination. However, in the course of treatment, disinfectant byproducts are formed, which are associated with increased risk of cancer and other chronic illnesses. EPA's disinfectant byproducts rule will regulate the use of chemicals used to purify water and levels of byproducts produced by disinfection. Stakeholders included water treatment system representatives, state and local governments, and environmental, consumer and public health interest groups. The committee met from November 1992 through June 1993, reaching essential agreement on the major issues.

Facilitators: Gail Bingham, RESOLVE (formerly The Conservation Foundation); Eric Van Loon, Endispute.

Notice of intent and announcement of public meeting, 57 Fed. Reg. 42533 (September 15, 1992)

Notice of proposed rule, 59 Fed. Reg. 6332 (February 10, 1994)

Notice of proposed rule, 59 Fed. Reg. 38668 (July 29, 1994)

Notice of proposed rule, 59 Fed. Reg. 38832 (July 29, 1994)

## Architectural and Industrial Maintenance Coatings

On October 2, 1992, EPA announced establishment of a committee to negotiate a rule to control volatile organic chemical emissions from architectural and industrial maintenance coatings. Section 183(e) of the Clean Air Act Amendments requires EPA to study volatile organic compound (VOC) emissions from manufacturing of commercial and consumer products. Because architectural and industrial maintenance (AIM) coatings, such as building and steel structure paints, are estimated by EPA to account for 20% of total commercial and consumer product VOC emissions, EPA considers AIM regulation a priority.

Informal data exchange meetings occurred from February through August 1992. EPA chartered the negotiation committee and held the first formal meeting in October 1992. Participants in the negotiations include environmental groups, states, private consumers, paint manufacturers, industrial trade associations, USDA, GSA, the Army Corps of Engineers, and the Federal Highway Administration.

Convenors/Facilitators: Barbara Stinson and John Ehrmann, Keystone Center.

Establishment of Federal Advisory Committee Act committee and meeting announcement, 57 Fed. Reg. 45597 (October 2, 1992)

## Wood Furniture Manufacturing Regulations

EPA established a committee to negotiate a proposed national emission standard for air pollutants from wood furniture manufacturing operations. Membership includes states, representatives from different size and types of furniture manufacturers, environmental and public interest groups, and a group committed to pollution prevention.

Convenors/Facilitators: John Lingelbach and Susan Wildau, CDR Associates.

Establishment of advisory committee and notice of meeting, 58 Fed. Reg. 34011 (June 23, 1993)

Notice of proposed rule, 59 Fed. Reg. 62652 (December 6, 1994)

## Small Nonroad Engine Regulations

In response to Section 213 of the Clean Air Act, as amended, EPA determined that nonroad mobile sources are significant contributors to total ozone precursor and carbon monoxide emissions in areas that have failed to attain the National Ambient Air Quality Standards for ozone and CO. The negotiated rulemaking addresses control of emissions from nonroad spark-ignited engines 25 horsepower and below, excluding marine propulsion and recreational propulsion engines. The committee was chartered September 30, 1993, and will terminate May 31, 1995. The committee consists of representatives of the small non-road engine manufacturers, engine servicing dealers, Natural Resources Defense Council, American Lung Association, Northeast States Coordinated Air Use Management, State of Wisconsin, and EPA.

Convenors: Howard Bellman and Lucy Moore. Facilitators: Lucy Moore and John Folk-Williams, Western Network.

Notice of intent to establish advisory committee, 58 Fed. Reg. 34389 (June 25, 1993)

Establishment of Federal Advisory Committee Act committee and meeting announcement, 60 Fed. Reg. 418 (January 4, 1995)

## Farm Credit Administration

### Assessment and Apportionment of Administrative Expenses

Under the Farm Credit Act of 1971, 12 USC 2001, the Farm Credit Administration assesses its administrative expenses on banks, associations, and certain related entities in the Farm Credit System. The FCA established a committee in May 1992 to negotiate proposed amendments to these regulations. Consensus was reached by July, and the negotiated formula was included in a proposed rule adopted by the FCA Board in September 1992. The Board adopted a final rule in February 1993, that was published in March 1993.

Convenor: William L. Larsen, Office of the General Counsel, Farm Credit Administration. Facilitators: Scott Beckenbaugh and Frances Dunham, Federal Mediation and Conciliation Service.

Notice of intent to establish a negotiated rulemaking committee, 57 Fed. Reg. 19405 (May 6, 1992)

Proposed rule, 57 Fed. Reg. 47288 (October 15, 1992)

Final rule, 58 Fed. Reg. 10939 (February 23, 1993)

## Federal Communications Commission

### Provision of Non-voice, Low Earth Orbit Satellite Services.

The Commission established an advisory committee to negotiate regulations defining the technical and service rules appropriate to the provision of data messaging and position determination services using low-earth orbit satellites ("little LEO"). The negotiations were intended to develop regulations designed to facilitate the shared use by the maximum number of service providers in the spectrum. The systems will ultimately provide low-cost 2-way data messaging and radiolocation services worldwide. A consensus was reached on proposed technical regulations.

Facilitator: William Luther, Federal Communications Commission.

Notice of proposed rule and request for comments, 57 Fed. Reg. 18857 (May 1, 1992)

Notice of Advisory Committee Establishment, Notice of Advisory Committee Meetings, 57 Fed. Reg. 33163 (July 27, 1992)

### Mobile Satellite Service in the Frequency Bands Above 1 GHz.

The Commission established a second advisory committee, which would develop proposed technical and spectrum-sharing regulations for licensing a more elaborate voice and message communication system ("big LEO").

Notice requesting comments on establishing an advisory committee, 57 Fed. Reg. 39661 (September 1, 1992)

Notice of advisory committee establishment and meetings, 57 Fed. Reg. 60781 (December 22, 1992)

### Local Multipoint Distribution Service and Fixed Satellite Service in the 28 GHz Band.

In July 1994, the Commission established an advisory committee to develop proposed technical standards for shared use of the 28 GHz band. Negotiations concerned sharing spectrum between the Local Multipoint Distribution Service and the Fixed Satellite Service.

Facilitator: William Luther, Federal Communications Commission.

Request for comments, 59 Fed. Reg. 7961 (February 17, 1994)

Notice of establishment of committee and meetings, 59 Fed. Reg. 33483 (June 29, 1994)

### Hearing Aid Compatible Telephones

The Federal Communications Commission established a committee to negotiate regulations that would specify the requirements for hearing aid compatible telephones in workplaces, hospitals and certain other health care facilities, prisons, hotels, and motels.

Facilitator: William Luther, FCC

Notice of intent to establish advisory committee, 59 Fed. Reg. 60343 (November 23, 1994)

Notice of advisory committee establishment and meetings, 60 Fed. Reg. 15739 (March 27, 1995)

## Federal Trade Commission

### Informal Dispute Settlement Procedures

The Federal Trade Commission convened a committee in September 1986 to negotiate revisions to the Commission's rule on informal dispute resolution procedures ("Rule 703"). The committee included representatives of automobile dealers, consumer groups, state officials, and other interest groups. The committee met monthly until June 1987, but was unable to reach consensus on a proposed rule. Because of continuing interest in the issues concerning Rule 703, the FTC published an advance notice of proposed rulemaking in May 1989 to obtain public comment on whether the rule should be amended.

Convenor/Facilitators: John A. S. McGlennon, ERM-New England; Gail Bingham, Conservation Foundation (RESOLVE).

Notice of Intent to Form Advisory Committee for Regulatory Negotiation, 51 Fed. Reg. 5205 (February 12, 1986)

Notice of Formation of Advisory Committee and Notice of First Meeting, 51 Fed. Reg. 29666 (August 20, 1986)

Final Rule on Advisory Committee Management, 51 Fed. Reg. 30055 (August 22, 1986)

Advance Notice of Proposed Rulemaking, 54 Fed. Reg. 21070 (May 16, 1989)

## Interstate Commerce Commission

### Electronic Tariff Filing

On April 6, 1994, the Interstate Commerce Commission proposed establishing an advisory committee to develop a rule concerning electronic tariff filing. In August, the ICC announced postponement of further action, to await the outcome of congressional deliberations affecting the agency and relevant statutory provisions.

Notice of proposal to establish a negotiated rulemaking committee, 59 Fed. Reg. 16164 (April 6, 1994)

Notice of postponement of action in establishing committee, 59 Fed. Reg. 41428 (August 12, 1994)

## Nuclear Regulatory Commission

### Submission and Management of Records and Documents Related to the Licensing of a Geologic Waste Repository for the Disposal of High-Level Radioactive Waste

NRC formed an advisory committee to negotiate a proposed rule on submission and management of documents relating to the licensing of a geologic repository for disposal of high-level radioactive waste. Committee meetings were originally planned to run from September 1987 through May 1988. However, the composition of the negotiating committee was revised early in 1988 to reflect the narrowed focus on a single site in Nevada for a geologic repository, as provided in the Nuclear Waste Policy Amendments Act of 1987 (Pub. L. 100-203). The committee completed its deliberations in July 1988, and in November the Commission published the "final negotiating text" as a proposed rule for public comment. This text was based on an agreement reached by state, Indian tribe, environmental, local government, and federal agency negotiators. The participating industry groups did not support the final proposal because of the projected costs of the licensing support system. On April 14, 1989, the Commission published the final rule, which was approved by a vote of 3 to 2.

Convenor/Facilitators: Howard S. Bellman, Timothy J. Mealey, Matthew A. Low, and Kirk Balcom, Conservation Foundation.

News Release (86-174), December 18, 1986

Notice of Intent to Form an Advisory Committee to Negotiate a Proposed Rule, 51 Fed. Reg. 45338 (December 18, 1986)

Notice of Establishment of an Advisory Committee to Negotiate a Proposed Rule, 52 Fed. Reg. 29024 (August 5, 1987)

Notice of the Change in Composition of the High-Level Waste Licensing Support System Advisory Committee, 53 Fed. Reg. 3404 (February 5, 1988)

Notice of Proposed Rulemaking, 53 Fed. Reg. 44411 (November 3, 1988)

Final Rule, 54 Fed. Reg. 14925 (April 14, 1989)

### Indemnity Agreements with Radiopharmaceutical Licensees

The Price-Anderson Amendments Act of 1988 (Pub. L. 100-408) was enacted on August 20, 1988. Section 19 provided that the Nuclear Regulatory Commission shall within 18 months of enactment determine whether to enter into indemnity agreements with radiopharmaceutical licensees. This term refers to persons licensed by the Commission or a state for the manufacture, production, possession, or use of radioisotopes for medical purposes. The legislation required that, for the purpose of making this determination, the NRC must first conduct a "negotiated rulemaking" in accordance with guidance provided by the Administrative Conference's 1982 recommendation. The NRC was required to select a convenor from a roster provided by the Administrative Conference. The legislative history made clear, though, that if no consensual agreement were reached, the convenor was to transmit his own recommendation to the Commission not later than March 20, 1989. In this respect, the concept of negotiated rulemaking appearing in the Act differed markedly from the procedure discussed throughout the *Sourcebook*. In addition, the issue to be negotiated appears to be a yes-or-no issue on which there may be little room for compromise by the parties.

Negotiating sessions took place from November 1988 to February 1989. On March 16, 1989, the convenor submitted to the NRC a recommendation that the Commission not extend indemnity under the Price-Anderson Act to any class of radiopharmaceutical licensees. Nevertheless, the convenor's recommendation was accompanied by a draft proposed rule, based on agreements among the parties and identifying areas of disagreement. The Commission announced in May that it had accepted the convenor's recommendation and was terminating the rulemaking.

Convenor: Howard S. Bellman.

Notice of Intent to Conduct a Negotiated Rulemaking and Schedule for the Proceeding, 53 Fed. Reg. 40233 (October 14, 1988)

News Release (89-88), NRC Terminates Negotiated Rulemaking on Insurance Provisions for Medical Licensees (May 23, 1989)

Termination of Rulemaking Proceeding, 54 Fed. Reg. 22444 (May 24, 1989)

# CHAPTER 11 - SOURCES OF ASSISTANCE

The Administrative Conference, in its role as a clearinghouse of information about administrative procedures, has endeavored to remain abreast of all negotiated rulemaking activity. The Office of the Chairman maintains a large collection of written materials from which the appendices of the *Sourcebook* have been chosen. In addition, Conference staff members are conversant with the theory and practice of reg-neg. Federal agencies are encouraged to take advantage of this resource.

Specific types of assistance are discussed elsewhere in the *Sourcebook.* See chapter 5 for sources of training assistance. See chapter 8 for information about the Administrative Conference's roster of neutrals. The table in chapter 10 identifies persons who have served as convenors or facilitators in negotiated rulemaking proceedings conducted by federal agencies. These individuals may in some instances be available as convenors or facilitators. Agency personnel who have participated in negotiated rulemaking can also be valuable sources of advice and experience.

The following organizations and offices have indicated that they have had experience either with negotiated rulemaking or with mediation in the context of resolving disputes that involve regulation, public policy or other governmental actions. The list contains names that have come to the attention of the Administrative Conference and no attempt has been made to produce a comprehensive list. Inclusion in the list should not be understood as an endorsement. For each organization, a brief description of available services is given, including research, training, and third-party neutrals.

Other sources of neutrals include the following:

- The Administrative Conference maintains a roster of neutrals who offer dispute resolution services. Individuals and organizations are listed on the roster at their own request. For further information, contact the Administrative Conference (see listing below).

- Each issue of *Consensus*, a quarterly newsletter published by the MIT-Harvard Public Disputes Program, includes a paid listing of dispute resolution and negotiated rulemaking resources. For further information, contact the Harvard Program on Negotiation (see listing below).
- Several mediators of the Federal Mediation and Conciliation Service are experienced with convening and facilitating federal agency negotiated rulemaking. For further information, contact FMCS (see listing below).

**Administrative Conference of the United States**
2120 L Street, NW, Suite 500
Washington, DC 20037
(202) 254-7020
Contact: David M. Pritzker

*Services*: The Administrative Conference is an independent federal agency charged with recommending improvements in administrative procedure and practice. Its program in alternative means of dispute resolution (ADR) provides research and training relating to procedures for the resolution of federal government disputes. The Conference assists agencies in setting up and carrying out reg-negs. It also maintains a roster of neutrals who are available to assist in negotiated rulemaking and other cases involving federal agencies.

**The Accord Group**
2471 Manoa Road
Honolulu, Hawaii 96822
(808) 537-3886
Contact: Peter S. Adler

*Services*: Services offered include mediation, facilitation, and other forms of assisted negotiation.

**American Arbitration Association**
National Representative Department
1730 Rhode Island Avenue, NW - Suite 909
Washington, DC 20036
(202) 331-7073
Contact: Tom Colosi, Vice President, Office of National Affairs

*Services*: AAA offers arbitration for public and private disputes and provides third-party neutrals for binding and non-binding resolution. The Association maintains a roster of neutrals and case histories. Its Department of Education and Training offers workshops in mediation and arbitration of labor relations, construction, insurance, securities and hazardous waste disputes. The Publications Department offers books, videos, periodicals and pamphlets about negotiation and dispute resolution mechanisms. AAA maintains guidelines for disputes in specific industries. There are 34 regional offices in the United States and an international membership.

**Howard S. Bellman**
119 Martin Luther King Jr. Blvd.
Suite 514
Madison, Wisconsin 53703
(608) 255-9393

*Services*: Howard Bellman offers mediation, convening, and facilitation services in negotiated rulemaking and other large-scale multi-party disputes. His practice emphasizes public policy conflicts.

**Brookman King**
611 Frederick Road, Suite 202
Catonsville, Maryland 21228
(410) 719-0580
Contact: Doug Brookman or Meg King

*Services*: Services offered include designing, facilitating, and managing large consensus building projects.

**Susan L. Carpenter**
1955 Bronson Way
Riverside, California 92506
(909) 784-7307 or (909) 784-7029

*Services*: Susan Carpenter is a conflict management consultant for mediation of multi-party public disputes, specializing in community issues.

**CDR Associates**
100 Arapahoe Avenue
Suite 12
Boulder, Colorado 80302
(303) 442-7367 or (800) 633-4283 (800-MEDIATE)
Contact: Mary Margaret Golten, Christopher Moore,
Susan Wildau, or Bernard Mayer

*Services*: CDR Associates offers nationwide public and private sector decision-making services, organizational consulting, conflict management assistance, and training. It provides mediation and facilitation for resolution of public disputes using consensus building techniques.

**Center for Dispute Settlement**
1666 Connecticut Avenue, NW
Washington, DC 20009
(202) 265-9572
Contact: Linda R. Singer or Michael Lewis

*Services*: The Center for Dispute Settlement offers mediation of public disputes and organizational disputes. It also trains public officials in negotiation and mediation.

**Decisions & Agreements, LLC**
1877 Broadway, Suite 601
Boulder, Colorado 80302
Contact: John Lingelbach
(303) 447-0200

*Services*: Services offered include convening, process design and facilitation.

**ERM (Environmental Resource Management) New England, Inc.**
205 Portland Street
Boston, Massachusetts 02114
(617) 742-8228
Contact: John McGlennon

*Services*: ERM New England offers consultation, mediation, meeting facilitation and other forms of dispute resolution for environmental and waste management issues. It has convened and mediated negotiated rulemaking proceedings for federal agencies.

**Federal Mediation and Conciliation Service**
2100 K Street, NW
Washington, DC 20427
(202) 606-5445
Contact: John A. Wagner, Director of Mission Support

*Services*: FMCS is a federal agency whose mission is to assist in the resolution of labor-management disputes through mediation and other related techniques and services. FMCS is also able to provide facilitators to federal agencies for negotiated rulemaking and training in dispute resolution.

**Philip J. Harter, Esq.**
2301 M Street, NW
Washington, DC 20037
(202) 887-1033

*Services*: Philip J. Harter provides dispute resolution services for negotiated rulemaking and other types of multi-party public conflicts. He has convened and mediated several negotiated rulemaking proceedings for federal agencies. He wrote the research report (reprinted in chapter 13 of the *Sourcebook*) that served as the basis for the Administrative Conference's original recommendation on negotiated rulemaking, and has studied extensively government use of other alternative means of dispute resolution.

**Harvard Program on Negotiation**
Fifth Floor, Pound Hall
Harvard Law School
Cambridge, Massachusetts 02138
(617) 495-1684
Contact: Lawrence Susskind, Director of the MIT-Harvard Public Disputes Program; Marjorie Aaron, Executive Director

*Services*: The Program provides negotiation courses within the law school, executive education programs, and courses on mediation and negotiation open to the public through the Radcliffe Seminar Series. The Public Disputes Program conducts research on multi-party conflicts involving public entities and publishes a quarterly newsletter, *Consensus*, which reports on developments in dispute resolution and lists resources.

**Institute for Conflict Analysis and Resolution**
(Formerly Center for Conflict Resolution)
George Mason University
Fairfax, Virginia 22030
(703) 993-1300
Contact: Kevin Clements, Director

*Services*: This academic center provides research in the theory and practice of conflict resolution, specializing in deep-rooted conflicts such as issues of race and gender. Its offerings include a master's degree program in conflict resolution and the only doctoral program in this field.

**Institute for Environmental Negotiation**
University of Virginia
Campbell Hall
Charlottesville, Virginia 22903
(804) 924-1970
Contact: Richard Collins, Director

*Services*: The Institute provides mediation services to public and private parties, to assist in resolving land use and environmental regulatory disputes.

**JAMS/Endispute, Inc.**
73 Tremont Street, 4th Floor
Boston, Massachusetts 02108
(617) 228-0200
Contact: Eric Van Loon

700 11th Street, NW, Suite 450
Washington, DC 20001
(202) 942-9180
Contact: Denise Madigan

21800 Oxnard Street, Suite 480
Woodland Hills, California 91367
(818) 593-6715
Contact: Alana Knaster

*Services*: JAMS/Endispute offers assisted negotiation and other services for resolving public disputes. It has experience in negotiated rulemaking and other types of administrative decisionmaking. JAMS/Endispute also provides training programs.

**Keystone Center**
P.O. Box 8606
Keystone, Colorado 80435
(303) 468-5822
Contact: Robert W. Craig, John Ehrmann, or Timothy J. Mealey

*Services*: Keystone Center is a non-profit organization focusing on development of public policy through consensus building techniques. It also provides training and promotes awareness of environmental and natural resources issues.

**Massachusetts Office of Dispute Resolution**
Room 1005
Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202
(617) 727-2224
Contact: Fredie Kay, Executive Director

*Services*: The Massachusetts Office of Dispute Resolution is a state government office that provides mediation for multi-party public policy disputes, especially in the environmental and social service areas.

**Mediate-Tech, Inc.**
114 East Main Street, Suite 200
Charlottesville, VA 22902
(804) 977-6343 or (800) 967-4555
Contact: Charles P. Lickson

*Services*: Mediate-Tech offers training, consulting and other ADR services, including consensus-building in public policy, technical and environmental disputes.

**The Mediation Group**
47 Eliot Street
Brookline, Massachusetts 02167
(617) 277-9232
Contact: David Matz, Brad Honoroff or Jane Honoroff

*Services*: This is a non-profit mediation group offering services for the resolution of public policy disputes. It also provides training in conflict resolution skills.

**The Mediation Institute**
21800 Oxnard Street, Suite 480
Woodland Hills, California 91367
(818) 593-6715
Contact: Alana Knaster
Gerald W. Cormick (206) 745-8792

*Services*: The Mediation Institute provides mediation and other dispute resolution services to assist in settlement of environmental and related conflicts. It assists with resource planning and development of regulations, and also provides training. It has convened and mediated negotiated rulemaking proceedings for federal agencies.

**Minnesota Office of Dispute Resolution**
340 Centennial Office Building
654 Cedar Street
St. Paul, Minnesota 55155
(612) 296-2633
Contact: Roger Williams, Director

*Services*: This is a state government office offering public dispute resolution services to all levels of government and special education mediation services to parents and school districts.

**National Institute for Dispute Resolution**
1726 M Street, NW, Suite 500
Washington, DC 20036
(202) 466-4764
Contact: W. Steve Lee

*Services*: NIDR is a private non-profit organization that makes grants for program development and research in dispute resolution. It has provided resource pool management services for negotiated rulemaking. Its program on public policy gives assistance to state ADR offices to help resolve multi-party public sector disputes.

**New Jersey Office of Dispute Settlement (ODS)**
Richard J. Hughes Justice Complex CN-850
Trenton, New Jersey 08625
609-292-1773
Contact: Eric R. Max, Director

*Services*: The Center is a state government office to resolve complex civil litigation and public disputes for state and federal courts.

**Northwest Renewable Resources Center**
Suite 1510
1411 4th Avenue
Seattle, Washington 98101
(206) 623-7361
Contact: Amy Solomon, Executive Director
Shirley Solomon, Project Director

*Services*: The Center provides a neutral forum for resolving natural resource policy disputes.

**Program on Alternative Dispute Resolution**
Office of the Administrative Director of the Courts
The Judiciary -- State of Hawaii
P.O. Box 2560
Honolulu, Hawaii 96804
(808) 539-4980
Contact: Michael F. Broderick, Director

*Services*: This state government office offers services to resolve public disputes, especially in the area of allocation of public resources.

**Resolve**
2828 Pennsylvania Avenue, NW
Suite 402
Washington, DC 20007
(202) 944-2300
Contact: Suzanne Orenstein

*Services*: Resolve (formerly the Conservation Foundation) is a non-profit organization that conducts interdisciplinary policy research on issues involving environmental and resource management. Its Environmental Dispute Resolution Project has provided facilitation and mediation services for negotiated rulemaking and public policy dialogues on environmental and public health issues.

**Society of Professionals in Dispute Resolution**
Suite 530
815 Fifteenth Street, NW
Washington, DC 20005
(202) 783-7277
Contact: Mary Kay LeFevour, Executive Director

*Services*: SPIDR is an international professional association of third-party neutrals, academics, and others involved in dispute resolution. It provides training, workshops, publications, information, and referral for mediators and other negotiators. It publishes a newsletter and reports of interest in the field. SPIDR has established a separate sector on public policy and environmental dispute resolution.

**Southeast Negotiation Network**
College of Architecture
Georgia Institute of Technology
Atlanta, Georgia 30332-0155
(404) 853-9846
Contact: Michael Elliott or Gregory Bourne, Co-Directors

*Services*: The Southeast Negotiation Network offers public policy dialogues, mediation, and assistance in resolution of planning issues.

**Tillinghast, Collins & Graham**
1 Old Stone Square
Providence, Rhode Island 02903-7104
(401) 456-1200
Contact: J. Michael Keating, Jr.

*Services*: This law firm's office of mediation offers mediation, consultation, and other forms of ADR assistance in the resolution of public policy, environmental, and other disputes.

**TLI Systems, Inc.**
4340 East West Highway
Suite 1120
Bethesda, Maryland 20814
(301) 718-2270
Contact: Daniel Dozier, Matthew Low, or Jim Kohanek

*Services*: TLI Systems is a full service environmental and public policy dispute resolution firm.

**Triangle Associates**
255 Colman Building
811 First Avenue
Seattle, Washington 98104
(206) 583-0655
Contact: Alice J. Shorett, President

*Services*: Triangle Associates acts as a neutral, specializing in environmental policy disputes.

**Washington Dispute Resolution Project**
Office of Financial Management
P.O. Box 43113
Olympia, Washington 98504-3113
(360) 586-8629
Contact: James O. Arthur

*Services*: Washington's state-wide mediation project helps agencies resolve public policy issues and install alternative dispute resolution programs.

**Western Network**
616 Don Gaspar
Santa Fe, New Mexico 87501
(505) 982-9805
Contact: John A. Folk-Williams or Lucy Moore

*Services*: Western Network provides mediation assistance in environmental dispute resolution and other types of public conflict management. It also provides training in negotiation skills, public participation planning, public policy analysis, and consensus building.

# CHAPTER 12 - BIBLIOGRAPHY

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12

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# CHAPTER 13 - SELECTED ARTICLES

Chapter 13 contains a variety of reportorial and analytic articles on negotiated rulemaking. Philip J. Harter's article, *Negotiating Regulations: A Cure for Malaise*, and an earlier version of *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, by Henry H. Perritt, Jr., served as the background reports for the Conference's two recommendations. Mr. Harter's *Regulatory Negotiation: Experienced Practitioner Offers Guidance* gives a mediator's perspective on his experiences. Professor Perritt's OSHA paper is a report to OSHA analyzing the MDA reg-neg. The Wald and Harter colloquy addresses issues of judicial review. Professor Funk's article is highly critical of negotiated rulemaking. His concerns are discussed in the context of EPA's woodstove proceeding. Ellen Siegler's article gives the perspective of an industry participant. Several shorter articles are included to illustrate varying perspectives on negotiating rules or to describe agency experiences.

## Index to Articles

The following index to the articles in chapter 13 is not exhaustive. It is intended simply to be an aid to finding discussions of several key issues.

**Advantages of Reg-Neg**
458, 540, 695, 834, 853, 858, 866, 909, 920

**Agency's Role**
487, 529, 547, 619, 681, 685, 747, 838, 841, 916, 918

**Agreements**
527, 552, 844, 846, 883, 909, 919

**Consensus**
522, 621, 689, 749, 762, 774, 838, 913

**Convening**
497, 545, 771, 836, 842, 845, 873, 891

**Costs**
696, 837, 918

**Court-annexed Reg-Neg**
909

**Criteria for Using Reg-Neg**
472, 629, 673, 709

**Criticism of Reg-Neg**
789, 876, 881, 909

**Disadvantages of Reg-Neg**
540, 909

**Education Title I Reg-Neg**
894

**EPA Asbestos Reg-Neg**
852, 872, 875, 881

**EPA Clean Fuels Reg-Neg**
917

**EPA Farmworker Protection Reg-Neg**
636, 867

**EPA Nonconformance Penalties Reg-Neg**
591, 714, 843

**EPA Pesticide Exemptions Reg-Neg**
595, 717, 844, 864

**EPA RCRA Permits Reg-Neg**
851

**EPA Toxic Chemical Leaks Reg-Neg**
908, 917, 921

**EPA Underground Injection Reg-Neg**
852, 883

**EPA Woodstove Reg-Neg**
789, 851, 870, 917

**Executive Order 12866**
911

**Ex Parte Communications**
646, 671

**FAA Flight and Duty Time Reg-Neg**
583, 834

**FCC Big LEO Reg-Neg**
910

**Federal Advisory Committee Act**
580, 652, 689, 840, 918

**FTC Dispute Settlement Reg-Neg**
637

**Judicial Review**
532, 649, 735, 754, 757, 767, 918

**Mediators**
507, 548, 623, 687, 733, 837, 892, 915, 916, 918

**Meeting Logistics**
679, 684, 837, 873

**Negotiated Rulemaking Act of 1990**
908, 911, 918

**Negotiations**
512, 549, 557, 615, 864, 875, 892, 912, 923

**Notices**
509, 836

**OMB**
548, 686

**OSHA Benzene Reg-Neg**
563

**OSHA MDA Reg-Neg**
633, 661

**Parties**
482, 510, 558, 655, 677, 760, 795, 837, 875, 909, 912, 917

**Resources and Funding**
485, 694, 731, 741, 743, 842, 859, 867, 884, 921

**Statutory Basis**
537, 638, 669, 823

**Subcommittees**
549, 692, 846, 882

**Training**
546, 874

**Traditional Procedures**
448, 704, 896, 908, 910

**Transportation Handicap Access Reg-Neg**
890

# Negotiating Regulations: A Cure for Malaise

Philip J. Harter*

*The formalization of rulemaking procedures has created a highly complex system of developing federal regulations. Although the procedures were intended to produce sound agency decisions and to safeguard against arbitrary and capricious rules, they have generated an adversarial system characterized by delay, expense, and dissatisfaction. Mr. Harter provides an alternative approach: negotiating proposed regulations. Negotiations as a supplemental rulemaking procedure would allow affected interests and an agency to participate directly in the development of a proposed rule while maintaining safeguards against arbitrary and capricious results. This article proposes in detail a negotiating process, which Mr. Harter believes would provide incentives and opportunities to resolve issues during rulemaking and would result in better rules.*

## Table of Contents

Introduction .......... 2
I. The Evolution of the Regulatory Process .......... 8
II. The Adversarial Process .......... 18
  A. Benefits of the Adversarial Process .......... 18
  B. Drawbacks of the Adversarial Process .......... 19
  C. The Complaints and the Response .......... 22
III. The Advantages of Rulemaking by Negotiation .......... 28
IV. Negotiating Policy Decisions: Analogues of Regulatory Negotiation .......... 31
  A. Current Regulatory Negotiations .......... 32
  B. Consensus Standards .......... 34
  C. Settlements .......... 36
  D. Public Law Litigation .......... 38
  E. National Coal Policy Project .......... 38
  F. Dialogue Groups .......... 40
  G. Environmental Negotiation .......... 40
V. Negotiating Regulations .......... 42
  A. Conditions that Improve the Likelihood of Successful Negotiations .......... 42
  B. The Appropriate Participants .......... 52

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This article is based on a report prepared for the Administrative Conference of the United States. The views expressed are those of the author alone and do not necessarily reflect those of the Conference, its committees, its chairman, or its staff. The Conference, however, did adopt Recommendation No. 82-4, 47 Fed. Reg. 30,701-30,710 (1982), entitled "Procedures for Negotiating Regulations," based on the report. The Recommendation is set forth in part in the Appendix.

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C. The Agency as Participant .................................. 57
D. Assembling the Negotiators .................................. 67
E. The Negotiations .................................. 82
F. The Extent and Nature of the Consensus .................................. 92
G. Reporting the Agreement .................................. 97
H. Agency Action .................................. 99
I. Judicial Review .................................. 102
J. Nondelegation Doctrine .................................. 107
K. Regulatory Impact Analysis .................................. 109
L. Benefits Beyond Consensus .................................. 110
M. Possible Adverse Consequences .................................. 110
VI. Conclusion: Worth a Try .................................. 112

## INTRODUCTION

The malaise of administrative law, and particularly of rulemaking, has been with us for at least fifteen years.[1] It has existed since the very origins of American administrative law, and it results from a fundamental lack of consensus over appropriate rulemaking procedures and the nature of government regulation as a whole.

The debate over rulemaking procedures and government regulation has taken place in two dimensions, political and procedural. The political fight has focused on whether agencies should be accorded broad discretion to effectuate regulatory programs,[2] or whether they should be given a more narrow, confined function.[3] Procedurally, there has been tension between according an agency broad flexibility to act with a minimum of procedural limitations[4] and requiring relatively formal procedures that permit interested parties to challenge the factual bases and policy choices of rules.[5] On the political side broad agency discretion has clearly been accepted,[6] if not always granted by individual statutes.[7] The procedural debate, however, continues.[8]

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[1] *See* American Airlines, Inc. v. Civil Aeronautics Bd., 359 F.2d 624, 630 (D.C. Cir.) (en banc) (difficulties currently experienced in administrative process sometimes referred to as its "malaise"), *cert. denied*, 385 U.S. 843 (1966). As Professors Bruff and Gellhorn observe, "Even the term 'malaise' has a pedigree." Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetos*, 90 HARV. L. REV. 1369, 1369 n.1 (1977) (citing H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES 2-3 (1962)).

[2] Woodrow Wilson advocated "large powers and unhampered discretion" for administrative agencies. Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197 (1887), *reprinted in* 56 POL. SCI. Q. 481, 497 (1941). *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3.3, at 152-57 (1978) (arguing that administrative agencies must be given broad jurisdiction over various fields to regulate in public interest without legislative branch defining particular means and ends); J. LANDIS, THE ADMINISTRATIVE PROCESS 68 (1938) (arguing in favor of 1930's legislation that frequently failed to set forth rules to control administrative action; instead, administrative agencies were delegated broad power to prescribe regulations to implement certain policies).

[3] *See* T. LOWI, THE END OF LIBERALISM 302-03 (2d ed. 1979) (criticizing vague legislative formulations; proposing administrative formality and "early rule-making" in place of case-by-case administrative adjudication and rulemaking that is subject to interest group pressure); Freund, *The Substitution of Rule for Discretion in Public Law*, 9 AM. POL. SCI. REV. 666, 675 (1915) (practice of delegating specification of generic legislative requirements to administrative commissions is constitutionally desirable and legitimate within narrow and definite limits); Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1183-84 (1973) (analyzing and criticizing the "broad delegation model," arguing that it does not accurately describe administrative process and creates damaging expectations); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1676 (1975) (charging that vague and general statutes create discretion in agencies that threatens legitimacy of agency action because major policy questions decided by officials not accountable to electorate).

[4] *See* J. LANDIS, *supra* note 2, at 68 (arguing in favor of legislation that does not prescribe particular

After President Roosevelt vetoed a bill calling for relatively formal administrative procedures[9] because he believed that it would straight-jacket the agencies,[10] the Administrative Procedure Act[11] (APA) was born of a compromise

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rules to control administrative action); *infra* note 10 (quoting President Roosevelt's opposition to formal procedures).

[5] *See* Scalia, *Chairman's Message*, 33 Ad. L. Rev. v, v-x (comparing procedural reform movements of 1946 and 1981 advocating greater formalization of rulemaking procedures); *cf.* Senate Comm. on the Judiciary, The Regulatory Reform Act, S. Rep. No. 305, 97th Cong., 1st Sess. 2 (1981) (explaining that regulatory reform bill proposes codification of enhanced procedural protections developed by courts because growing pervasiveness and complexity of federal regulation requires more formalized approach).

[6] *See* Jaffe, *supra* note 2, at 1183 (noting that it is once again fashionable to advocate broad delegation model).

[7] Ackerman & Hassler, *Beyond the New Deal: Coal and the Clean Air Act*, 89 Yale L.J. 1466, 1556 (1980) (discussing "agency-forcing statutes" that remove issues from agency discretion).

[8] The Committee on Governmental Operations of the United States Senate engaged in a comprehensive examination of federal regulation pursuant to S. Res. 71, 95th Cong., 1st Sess., 123 Cong. Rec. 4382 (1977). Senate Comm. on Governmental Affairs, Principal Recommendations and Findings of the Study on Federal Regulation, 96th Cong., 1st Sess. iii (1979). The committee made many procedural recommendations. *Id.* at 1-2. In addition, major regulatory reform bills that would amend the APA's rulemaking procedures have been introduced in both the House and Senate in the last two Congresses. *See, e.g.,* S. 1080, 97th Cong., 1st Sess., 127 Cong. Rec. S4231-34 (daily ed. April 30, 1981) (proposing new regulatory requirements, including agency consideration of reasonable alternatives to proposed rule and projected benefits and adverse effects of proposed rule and alternatives); H.R. 746, 97th Cong., 1st Sess., 127 Cong. Rec. H73 (daily ed. Jan. 6, 1981) (same); H.R. 3150, 96th Cong., 1st Sess., 125 Cong. Rec. 6338-40 (1979) (same); S. 755, 96th Cong., 1st Sess., 125 Cong Rec. 6152-59 (1979) (same); S. 262, 96th Cong., 1st Sess., 125 Cong. Rec. 1411-30 (1979) (proposing new regulatory requirements, including agency consideration of projected effects of rule). Hearings filling many volumes were held on the respective bills. As a result, Congress has probably given more thought and attention during the past few years to regulatory procedure than at any time since the decade during which the APA was developed. Moreover, the White House has been active to an unprecedented degree, imposing wholly new procedural requirements on the agencies in the executive branch. *See* Exec. Order No. 11,821, 39 Fed. Reg. 41,501 (1974), *reprinted in* 12 U.S.C. app. § 1904 (1976) (requiring preparation of inflationary impact statements for major rules), *amended by* Exec. Order No. 11,949, 42 Fed. Reg. 1,017 (1976); Exec. Order No. 12,044, 43 Fed. Reg. 12,661 (1978) (requiring various agency procedures, including approval by agency head of significant regulations); Exec. Order No. 12,291, 3 C.F.R. 127 (1981) (requiring various agency procedures, including preparation of regulatory impact analysis of major rules).

[9] Walter-Logan Bill, H.R. 6324, 76th Cong., 3d Sess. § 2(a), 84 Cong. Rec. 5561 (1939) (rules issued only after publication of notice and public hearings).

[10] Explaining his reasons for vetoing the bill, President Roosevelt stated:

> The administrative tribunal or agency has been evolved in order to handle controversies arising under particular statutes. It is characteristic of these tribunals that simple and nontechnical hearings take the place of court trials and informal proceedings supersede rigid and formal pleadings and processes. . . .
>
> . . . [A] large part of the legal profession[, however,] has never reconciled itself to the existence of the administrative tribunal. Many of them prefer the stately ritual of the courts, in which lawyers play the speaking parts, to the simple procedure of administrative hearings which a client can understand and even participate in. . .
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> In addition . . . there are powerful interests which are opposed to reforms that can only be made effective through the use of an administrative tribunal. . . . Great interests . . . which desire to escape regulation rightly see that if they can strike at the heart of modern reform by sterilizing the administrative tribunal which administers them they will have effectively destroyed the reform itself.

86 Cong. Rec. 13,942 (1940).

[11] Pub. L. No. 79-404, 60 Stat. 237 (1946), *repealed and replaced by* Pub. L. No. 89-554, 80 Stat. 378 (1966) (codified as amended at 5 U.S.C. §§ 551-59, 701-06 (1976)).

between the competing factions.[12] The APA has served as the foundation of agency rulemaking for more than a generation without having been significantly amended.[13] Although, at first blush, that durability suggests an enduring agreement that the APA's provisions are broadly applicable, such is not the case.[14] The APA, unlike the Federal Rules of Civil Procedure, has not garnered a supporting consensus. The Federal Rules were developed roughly contemporaneously with the APA and continue to have the general allegiance of Congress, practitioners, and scholars.[15] The Federal Rules continue to shape judicial practice even though entirely new forms of litigation have arisen.[16]

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[12] Before the APA was enacted, the Attorney General's Committee on Administrative Procedure recommended that public hearings be held for rules of economic character, and "established as standard administrative practice, to be extended as circumstances warrant into new areas of rule making." ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, FINAL REPORT 108 (1941) [hereinafter FINAL REPORT]. The Committee acknowledged that hearings already were required for the establishment of regulations under a number of statutes, writing:

> The regulation of . . . these matters bears upon economic enterprise and touches directly the financial aspects of great numbers of businesses affected, either by imposing direct costs or by limiting opportunities for gain. Appreciation of these effects, both by businessmen and government officials, seems to be the chief cause of the increased use of hearings in administrative rulemaking.

*Id.* The Committee recommended against requiring hearings in all rulemakings, however, because "[a]dvance notice and hearings in rule making inescapably involve expense and a measure of delay—not always warranted in connection with regulations of minor, non-controversial character." *Id.* Thus, the Committee was prepared to rely "upon administrative good faith—good faith in not dispensing with hearings when controversial additions to or changes in rules are contemplated." *Id.*

When ultimately enacted the APA reflected the view of the Attorney General's Committee on Administrative Procedure. The Senate committee that was largely responsible for the APA cited with approval a statement by the Attorney General's Committee:

> An administrative agency . . . is not ordinarily a representative body. . . . Its deliberations are not carried on in public and its members are not subject to direct political controls as are legislators. . . . Its knowledge is rarely complete, and it must always learn the . . . viewpoints of those whom its regulations will affect. . . . [Public] participation . . . in the rulemaking process is essential in order to permit the administrative agencies to inform themselves and to afford safeguards to private interests. It may be accomplished by oral or written communication and consultation; by specially summoned conferences; by advisory committees; or by hearings.

S. REP. NO. 752, 79th Cong., 1st Sess. (Comm. Print) (1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 248, 79th Cong., 2d Sess. 19-20 (1946) [hereinafter LEGISLATIVE HISTORY]. The Committee pointed out that it did not recommend hearings for administrative rulemakings in cases in which Congress had not required hearings by separate statute. *Id.* at 20. The Committee also acknowledged that, "[p]rivate parties complain that this subsection provides inadequate procedure, particularly in the matter of findings and conclusions." *Id.* The Committee explained that in its view, the requirement that agencies consider "all relevant matter presented" and issue "a concise general statement of their basis and purpose" would achieve the goal of a more elaborate scheme. *Id.*

[13] *See* Williams, *Fifty Years of the Law of Federal Administrative Agencies—and Beyond*, 29 FED. B.J. 267, 268 (1970) (APA has never been significantly amended).

[14] *See* PRESIDENT'S COMMISSION FOR A NATIONAL AGENDA FOR THE EIGHTIES, GOVERNMENT AND THE REGULATION OF CORPORATE AND INDIVIDUAL DECISIONS IN THE EIGHTIES: REPORT OF THE PANEL ON GOVERNMENT AND THE REGULATION OF CORPORATE AND INDIVIDUAL DECISIONS 46-51 (1981) [hereinafter GOVERNMENT AND REGULATION] (reviewing current proposals for procedural reform).

[15] As Professors Wright and Miller have noted, "[T]he chorus of approval by judges, lawyers, and commentators has been virtually unanimous, unstinted, and spontaneous." 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1008, at 65 (1969).

[16] The Federal Rules of Civil Procedure have, of course, been modified over the years, but neither the Advisory Committee, the courts, nor Congress has made any wholesale changes in the rules, either by means of interpretations or radical modifications of the basic concepts. The basic contours of a

Rulemaking procedures, on the other hand, have changed markedly to respond to new forms of regulation. The courts have imposed procedural requirements through scores of judicial decisions,[17] and Congress has regularly supplemented the APA's procedures in new substantive statutes.[18] The resulting regulatory process, "hybrid rulemaking," combines the original informal rulemaking procedures of the APA and the more recent procedures imposed by Congress and the courts.[19]

The current debate on rulemaking centers not on whether procedures in addition to those of the APA are appropriate,[20] but rather on what are proper

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judicial proceeding still are determined by the original structure of the federal rules. *See* 1 J. Moore, Moore's Federal Practice, ¶ 0.2(2) (2d ed. 1982) (describing history of Federal Rules of Civil Procedure).

[17] *See* DeLong, *Informal Rulemaking and the Integration of Law and Policy*, 65 Va. L. Rev. 257, 259, 266-70 (1979) (federal courts of appeals have expanded obligations of agencies during informal rulemaking). In Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978), the Supreme Court held that lower courts may not require additional procedures during informal rulemaking beyond those necessary to afford an aggrieved party due process. *Id.* at 542. *Vermont Yankee*, however, did not overturn specific informal rulemaking requirements imposed by courts of appeals in earlier cases. This ambiguity in the decision prompted one commentator to note the "tension between the opinion's language and its outcome." DeLong, *supra*, at 260; *see also infra* note 60 (discussing *Vermont Yankee*).

[18] *See, e.g.,* National Highway Traffic Safety Act § 105(a)(2), 15 U.S.C. § 1394(a)(2) (1976) (court reviewing standard promulgated by Department of Transportation may order Secretary of agency to take more evidence); Consumer Product Safety Act §§ 7(a)(2)-9, 15 U.S.C. §§ 2056(a)(2)-2058 (1976) (during rulemaking, Consumer Product Safety Commission (CPSC) must allow interested persons to present data, opinions, or arguments orally, as well as in writing as provided by 5 U.S.C. § 553(c)); Toxic Substances Control Act § 6(c)(2), 15 U.S.C. § 2605(c)(2) (1976) (during rulemaking, Environmental Protection Agency (EPA) must comply with procedures additional to 5 U.S.C. § 553, including holding an informal hearing); Occupational Safety and Health Act § 6(b)(1)-(5), 29 U.S.C. § 655(b)(1)-(5) (1976) (during rulemaking, Occupational Safety and Health Administration (OSHA) must comply with procedures additional to 5 U.S.C. § 553, including holding an informal hearing); Clean Air Act, Pub. L. No. 95-95, § 305(a), 91 Stat. 772-76 (1977) (codified as amended at 42 U.S.C. § 7607(d) (Supp. IV 1980)) (during rulemaking, EPA must permit oral presentation of evidence and must respond to any written or oral comments).

[19] DeLong, *supra* note 17, at 260-61. The exact contours of hybrid rulemaking are fuzzy. Generally, the additional procedures include an opportunity for oral hearing, with or without cross-examination, requirements that the agency explain its factual basis, the methodology and reasoning used to proceed from those facts to the ultimate rule, and a more stringent form of judicial review. *See* Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 392-93 (D.C. Cir. 1973) (requiring EPA on remand of challenged standard to respond to cement industry's comments and to identify clearly basis for standards promulgated), *cert. denied*, 417 U.S. 921 (1974); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 648, 650 (D.C. Cir. 1973)(requiring EPA on remand of challenged standard to produce reasoned presentation of reliability of predictions and methodology used to reject manufacturer's evidence showing no available technology to comply with standards); Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking: Administrative Conference of the United States, Recommendation 76-3, 1 C.F.R. § 305.76-3 (recommending agencies follow procedures additional to those of APA, 5 U.S.C. § 553, including responding to parties'comments, explaining testing methodologies, holding hearings, and allowing oral presentations in order to encourage parties' participation in rulemaking); DeLong, *supra* note 17, at 260 n.22 (citing additional authorities).

[20] The drafters of the APA itself contemplated that in particular cases agencies would use procedures beyond the minimum requirements of the APA. The Senate report accompanying the bill that became the Administrative Procedure Act described rulemaking procedures as follows:

> This subsection states, in its first sentence, the minimum requirements of public rule making procedure short of statutory hearing. Under it agencies might in addition confer with industry advisory committees, consult organizations, hold informal "hearings", and the like. Considerations of practicality, necessity, and public interest . . . will naturally govern the agency's determination of the extent to which public proceedings should go. Matters of great import, or those where the public submission of facts will be either useful to the agency or a protection to the public, should naturally be accorded more elaborate public procedures. The agency

procedures[21] and when should they be followed.[22] Even though there is general agreement that some form of hybrid rulemaking process is appropriate for rules having a significant effect,[23] the malaise remains—parties complain about the time,[24] expense,[25] and legitimacy[26] of the administrative decisions reached by the hybrid process. Moreover, a number of legislative enactments

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> must analyze and consider all relevant matter presented. The required statement of the basis and purpose of rules issued should not only relate to the data so presented but with reasonable fullness explain the actual basis and objectives of the rule.

S. Rep. No. 752, 79th Cong., 1st Sess. (Comm. Print) (1945), *reprinted in* Legislative History, *supra* note 12, at 200-01.

[21] *See* Senate Comm. on the Judiciary, Regulatory Reform Act, S. Rep. No. 284, 97th Cong., 1st Sess. 93-106 (1981) (to accompany S. 1080, 97th Cong., 1st Sess. (1981)) (discussing proposed development and codification of various hybrid rulemaking procedures); Senate Comm. on Governmental Affairs, Regulatory Reform Act S. Rep. No. 305, 97th Cong., 1st Sess. 72-77, 84-92 (1981) (to accompany S. 1080, 97th Cong., 1st Sess. (1981)) (same).

[22] *See generally* DeLong, *supra* note 17, at 261-62 (discussing skepticism of government decisionmaking evidenced by heightened judicial scrutiny and nonlegal criticism of informal rulemaking). Recent bills require procedures beyond the minimal procedures of the current APA for all rulemakings and additional procedures for "major" rules. *See supra* note 8 (citing bills). Although the definition of "major" varies in the bills, each would apply the definition to those regulations having an effect on the economy of more than $100,000,000 or a significant effect on the economy as a whole or a particular segment of it. H.R. 746, 97th Cong., 1st Sess. § 621 (1981); S. 1080, 97th Cong., 1st Sess. 32, 127 Cong. Rec. S4231-34, at S4231 (daily ed. April 30, 1981); H.R. 3263, 96th Cong., 1st Sess., § 601 (1979); S. 755, 96th Cong., 1st Sess. § 601 (1979), 125 Cong. Rec. S3338-45, at S3339 (daily ed. March 26, 1979); S. 262, 96th Cong., 1st Sess. § 601, 125 Cong. Rec. S861-80, at S862 (daily ed. January 31, 1979).

[23] *See* DeLong, *supra* note 17, at 301-09 (discussing necessity of hybrid rulemaking).

[24] *See* S. Comm. on Governmental Affairs, 95th Cong., 1st Sess., Delay in the Regulatory Process, 4 Study on Federal Regulation 1 (Comm. Print 1977) (deficiencies in process include delays in rulemaking procedure); Morgan, *Toward a Revised Strategy for Ratemaking*, 78 U. Ill. L.F. 21, 22 & n.6 (1978) (describing generally parties' complaints of delay in regulatory process and results of questionnaire sent to lawyers practicing before regulatory agencies).

[25] S. Comm. on Governmental Affairs, 95th Cong., 1st Sess. Extent and Cost of Participation: Public Participation in Regulatory Agency Proceedings, 3 Study on Federal Regulation 12 (Comm. Print 1977) [hereinafter Public Participation].

[26] Practically every aspect of modern regulation has been attacked in one way or another. For example, one common complaint is that agencies do not develop adequate factual bases to support their rules. *See* R. Crandall & L. Lave, The Scientific Basis of Health and Safety Regulation 3 (1981) (standards often promulgated on only fragmentary evidence).

Another common complaint is that agencies develop inappropriate policies. *See* Ackerman & Hassler, *supra* note 7, at 1469 (EPA's emission standards for new coal-burning power plants will cost public tens of billions of dollars to achieve environmental goals that could be reached more cheaply, more quickly, and more surely by other means). Yet another criticism is that agencies use clumsy and expensive regulatory tools. *See* P. MacAvoy, The Regulated Industries and the Economy 26 (1979) (agencies' use of accounting measurements of previous business activities as basis for price regulation constrains agency decisionmaking and causes regulated companies to shape behavior to conform to agency measuring devices); C. Schultze, The Public Use of Private Interest vii (1977) (regulatory efforts are often inefficient and do more harm than good); Cornell, Noll, & Weingast, *Safety Regulation*, in Setting National Priorities 462 (H. Owen & C. Schultze eds. 1976) (because of overlapping jurisdiction of FDA and OSHA, same violation may lead to very different outcomes depending on which agency "smells the rat").

Finally, there are also allegations that regulation has been ineffective in achieving its goals. *See* P. MacAvoy, *supra*, at 105-07. Criticisms of the regulatory process appear regularly in *Regulation* magazine. *See, e.g.,* Kristol, *A Regulated Society?*, Regulation, July-Aug. 1977, at 12, 12 (social and economic complexities make effective regulation difficult enterprise); Mendeloff, *Does Overregulation Cause Underregulation?*, Regulation, Sept.-Oct. 1981, at 47, 47 (standards have been set so strictly that benefits often fall short of costs); Reich, *Warring Critiques of Regulation*, Regulation, Jan.-Feb. 1979, at 37, 37 (reviewing arguments that regulation is both politically unresponsive and economically inefficient). Politicians, business, and public interest groups alike seem to agree that the process is not working well. *See* Morgan, *supra* note 24, at 21-22 & n.1-6 (citing to various critics of regulatory process).

and proposals reflect a disquiet with hybrid rulemaking.[27] Thus, now is a propitious time to step back and ask whether the difficulty stems from a basic lack of confidence in both the flexible agency procedure model and the formal agency procedure model of rulemaking, and whether a new departure can provide the missing legitimacy.

This article proposes that a form of negotiation among representatives of the interested parties, including administrative agencies, would be an effective alternative procedure to the current rulemaking process. Although virtually every rulemaking includes some negotiation, it is almost never the group consensus envisioned here. Negotiations among directly affected groups conducted within both the existing policies of the statute authorizing the regulation and the existing policies of the agency, would enable the parties to participate directly in the establishment of the rule. The significant concerns of each could be considered frontally.[28] Direct participation in rulemaking through negotiations is preferable to entrusting the decision to the wisdom and judgment of the agency, which is essential under the basic provisions of the APA,[29] or to relying on the more formal, structured method of hybrid rulemaking in which it is difficult for anyone to make the careful trade offs necessary for an enlightened regulation.[30] A regulation that is developed by and has the support of the respective interests would have a political legitimacy that regulations developed under any other process arguably lack.[31]

Negotiation undoubtedly will not work for all rules. Failure to use negotiations appropriately either could lead to great abuse or could simply add another layer to the already protracted rulemaking process. Experiences in analogous areas, however, suggest instances in which negotiation could be a feasible method of setting rules, and identify the procedures that should be followed to ensure that an acceptable rule emerges from a negotiation process. Because regulatory negotiation is a response to the current malaise and would have to be consistent with the political role of the regulatory agency, it is appropriate to begin with a brief review of the evolution of regulation.

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[27] *See infra* notes 133-53 and accompanying text (discussing proposals for reform of administrative procedure).

[28] In 1941, the Attorney General's Committee on Administrative Procedure made a similar recommendation:

> The practice of holding conferences of interested parties in connection with rule making introduces an element of give-and- take on the part of those present and affords an assurance to those in attendance that their evidence and points of view are known and will be considered. As a procedure for permitting private interests to participate in the rule making process it is as definite and may be as adequate as a formal hearing. If the interested parties are sufficiently known and are not too numerous or too hostile to discuss the problems presented, conferences have evident advantages over hearings in the development of knowledge and understanding.

FINAL REPORT, *supra* note 12, at 104.

[29] Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 HARV. L. REV. 410, 417 (1978).

[30] *See* Boyer, *Alternatives to Administrative Trial Type Hearings for Resolving Complex Scientific, Economic and Social Issues*, 71 MICH. L. REV. 111, 113, 119 (1972) (hybrid form of administrative decisionmaking incorporates elements of adjudication and rulemaking; administrative adjudication ill-suited to taking into account and balancing many variables); Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting*, 58 VA. L. REV. 585, 586 (1972) (formal adjudicatory procedures of agencies not well adapted to make social, economic, and scientific investigations and decisions).

[31] As Professor Daniel Bell observes, "[s]ince political action, fundamentally seeks to reconcile conflicting and often incompatible interests, . . . political decisions are made by bargaining or by law, not by technocratic rationality." D. BELL, THE CULTURAL CONTRADICTIONS OF CAPITALISM 12 (1976).

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## I. The Evolution of the Regulatory Process

Although it is customary to attribute the origins of modern regulation to the New Deal, many diverse regulatory programs were created between the turn of the century and the early thirties.[32] The dominant theme of administrative law during this period was the protection of private interests against unwarranted government intrusion.[33] Early regulatory programs confined administrative discretion to authority explicitly delegated by Congress.[34] Thus, many early statutes required hearings or other procedures in addition to notice and comment for the development of rules.[35]

The regulatory procedure currently in use traces its origins to the New Deal concept of regulation and regulatory agencies. Under this concept Congress would grant broad powers[36] to agencies by using vague, general standards to

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[32] As one commentator stated, "The presidencies of Roosevelt, Taft, and Wilson saw dramatic change in the attitude of the federal government toward positions of economic power. The philosophy and the rhetoric of the period were populist, but the expanded use of Federal executive authority clearly was not. New Federal laws were passed, new regulatory agencies established, and important precedents were set that permanently established Federal regulation as a fact of economic life." S. Morris, The Regulatory State: Evolution and Outlook, Publication No. 4, Center for Business and Public Policy, University of Maryland 6 (1981).

For example, the Antitrust Division of the Department of Justice was created in 1903, Act of February 25, 1903, Pub. L. No. 57-115, 32 Stat. 854, 903-04. The Federal Meat Inspection Act was passed in 1906. Act of June 30, 1906, Pub. L. No. 59-382, 34 Stat. 669, 672-79 (1906) (codified in scattered sections of U.S.C.). The Pure Food and Drug Act was passed in 1906. Act of June 30, 1906, Pub. L. No. 59-384, 34 Stat. 768 (1906), *repealed by* Federal Food, Drug, and Cosmetic Act § 902(a), Pub. L. No. 75-717, 52 Stat. 1040, 1059 (1938). The regulatory powers of the Interstate Commerce Commission were expanded in 1906, 1910, and 1920, Act of June 29, 1906, Pub. L. No. 59-337, 34 Stat. 584 (1906); Act of June 25, 1910, Pub. L. No. 61-266, 36 Stat. 703, 720 (1910); Transportation Act of 1920, Pub. L. No. 66-152, §§ 439-441, 41 Stat. 456, 494-99. The Federal Reserve System was created in 1913. Federal Reserve Act, Pub. L. No. 63-43, 38 Stat. 251 (1913) (now codified in scattered sections of 12 U.S.C.). The Merchant Seamen's Act came in 1915, Act of March 4, 1915, Pub. L. No. 63-302, 38 Stat. 1164 (codified in scattered sections of U.S.C). The Federal Trade Commission was established in 1914. Act of September 26, 1914, Pub. L. No. 63-203, 38 Stat. 717 (now codified at 15 U.S.C. §§ 41-58). The Owens-Keating Act prohibiting interstate transportation of goods produced by child labor was enacted in 1916. Act of September 1, 1916, Pub. L. No. 64-249, 39 Stat. 675. The Shipping Board was established in 1916. Shipping Act of 1916, Pub. L. No. 64-260, 39 Stat. 728 (now codified as 46 U.S.C. §§ 801-842). The 1941 Attorney General's Committee on Administrative Procedure describes additional programs and amendments to existing programs that were enacted prior to 1935. Final Report, *supra* note 12, at 105-07.

[33] E. Freund, Administrative Powers Over Persons and Property 583 (1928) (primary incidence of violation of public interest is private injury; administrative action is initiated to remedy private complaint). *But cf.* J. Beck, Our Wonderland of Bureaucracy 164, 270 (1932) (criticizing administrative system because it burdens private business interests and impairs individualism).

[34] Stewart, *supra* note 3, at 1671-73.

[35] Final Report, *supra* note 12, at 105-08.

[36] In 1941 the Attorney General's Committee on Administrative Procedure stated:

> Broadly speaking, the causes of the growth of administrative rule making are twofold: [t]he increasing use by Congress of "skeleton legislation," to be amplified by executive regulations; and the expansion of the field of Federal control—indeed of governmental intervention generally—in which the new legislation, like the old, contains its quota of delegation of rule making power.

Final Report, *supra* note 12, at 98. The Committee pointed out that one of the justifications for "skeleton legislation" is "the desirability of expert determination of numerous matters involved in modguide agency decisions.[37] The animating force of regulation was the expertise of the agency staff.[38] The detached, neutral, technocratic experts of the agency were viewed as those most able to make the detailed decisions necessary to implement a functioning regulatory program.[39] A corollary of this theory was that agencies must be politically insulated to protect their expertise from the taint of the political process.[40] Courts, therefore, were to sustain agency action so long as such action had a rational basis.[41] Dean Landis, undoubtedly the greatest proponent of the New Deal theory of administration,[42] analogized judicial review of a regulation to the task of reviewing legislation. He justified the high burden necessary to overturn a regulation on the ground that "the administrative judgment . . . would tend . . . to have much weight because of its assumed expertness."[43]

Although the APA imposed some limitations on the free rein of the experts, it was clearly built on the notion of agency expertise. The primary function of the rulemaking section was to provide an outreach by the agency for information that would help it exercise its discretion in shaping the rule while affording an opportunity for the public to make its views known.[44] The APA itself required only scant procedures.[45] For significant rules, however, the legislative history indicates that agencies were expected to provide the public with an opportunity to participate through oral or written communications and consultations, consultation with advisory committees and interested organizations,

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ern legislative schemes such as those affecting housing, health, social security, and public services of many sorts." *Id.* at 98 n.17.

[37] J. LANDIS, *supra* note 2, at 66 (broad and vague administrative standards typical of legislation in 1930's); Jaffe, *supra* note 2, at 1186 (legislative objectives loosely defined in 1930's).

[38] This "model [of] administration derived its content and its authority, not from legislative or imperial dictates, but from an assumed, comprehensive body of expertise available for the implementation of legislative grants of authority." Jaffe, *supra* note 2, at 1187; *see also* J. FREEDMAN, CRISIS AND LEGITIMACY 44-46 (1978) (reliance upon expertise was principal attribute of administrative theory under New Deal and before).

[39] Profesor Stewart analogizes this view of agency expertise to that of a doctor. The doctor considers the patient's complaints, ascertains his general state of health, determines the cause of the malady, and prescribes a remedy. Stewart, *supra* note 3, at 1678. Just as few would argue that a doctor has too great discretion in treating a patient, the view was that the professionalism of the agency's staff held the government's power in check. *Id.*

[40] *See* Ackerman & Hassler, *supra* note 7, at 1471-73 (discussing three elements of New Deal model: affirmation of agency expertise, insulation of agencies from political control, and insulation from judicial oversight).

[41] The Attorney General's Committee on Administrative Procedure noted in 1941 that "[I]t should be enough that the administrative authorities are required, in case their regulations are called in question before a court, to demonstrate that they come rationally within the statutory authorization." FINAL REPORT, *supra* note 12, at 119. In 1939 the Supreme Court expressed the same sentiment: "So long as there is warrant in the record for the judgment of the expert it must stand. . . . 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.' " Rochester Tel. Corp. v. United States, 307 U.S. 125, 145-46 (1939) (quoting Mississippi Valley Barge Line Co. v. United States, 292 U.S. 282, 286-87 (1934)); *see also* Securities & Exchange Comm'n v. Chenery Corp., 332 U.S. 194, 207 (1947) (court may disturb commission's decision only if decision lacks rational and statutory foundation).

[42] Professor Jaffe called Landis "one of [the New Deal's] . . . most important intellectuals." Jaffe, *supra* note 2, at 1187.

[43] Landis, *Administrative Policies and the Courts*, 47 YALE L.J. 519, 533 (1938).

[44] As the Attorney General's Committee on Administrative Procedure noted in 1941, "Participation . . . in the rule-making process is essential in order to permit administrative agencies to inform themselves and to afford adequate safeguards to private interests." FINAL REPORT, *supra* note 12, at 103.

[45] Administrative Procedure Act § 4(a), 5 U.S.C § 553(a) (1976) (requiring notice of proposed rulemaking and giving interested persons opportunity to comment).

and informal hearings.[46] As a compromise with those who advocated more formal procedures, agencies were directed to consider the data submitted and to explain the basis of its rule in order to force the agency to actually consider the material.[47] The agency was not, however, limited to the facts contained in any record made in the rulemaking proceeding. "Accordingly," the Attorney General explained in 1947, "an agency is free to formulate rules on the basis of materials in its files and the knowledge and experience of the agency, in addition to the materials adduced in public rulemaking proceedings."[48] Whether or not the expertise model of the regulatory agency ever gained universal acceptance,[49] it clearly exerted a major influence in the development of regulatory procedures.

Beginning in the mid-1960's, regulatory procedure began its evolution toward the hybrid process. New regulatory programs were enacted; many of these directly regulated technology or involved broad, complex economic matters.[50] Both forms of regulation require an agency to develop large amounts of factual material before issuing a rule. With the advent of factually bound rules, the minimum procedures of the APA were no longer sufficient. New statutes augmented the notice and comment process by requiring substantial evidence to support a rule.[51]

The courts also played a role in expanding administrative procedures. They required agencies to explain the reasons for their actions in much greater detail[52] and directed agencies to develop far more factual information to support rules.[53] Courts also augmented the standard of judicial review and began to conduct careful and searching reviews of the data agencies developed to support a rule[54] and the methodology used to progress from that data to the rule.[55] Ultimately the "rational basis" test[56] was discarded in favor of the "hard look" standard of review.[57]

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[46] *See supra* note 12 (discussing procedures for economic regulation).

[47] *See supra* notes 12, 20 (discussing procedures enacted in APA).

[48] U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 31-32 (1947)

[49] Professor Jaffe argues that an essential ingredient of the New Deal model was that there was broad public opinion to support the political goals of the agencies and, hence, there was a political philosophy against which the agencies could operate. Jaffe, *supra* note 2, at 1186. He noted:

> But, we came to see that the Landis model, if taken as a generalization valid for all administrative agencies at all times, makes certain untenable assumptions: the existence in each case of relevant, value-free concepts, and an administration located at any given moment of time outside the political process, that is to say, outside or insulated from the power structure.

*Id.* at 1187. He also observes that at the time Landis wrote, the agencies that Landis used as a model for his theory were becoming not only ineffective but harmful. *Id.*

[50] William Lilley, III and James C. Miller, III, list 30 new regulatory programs enacted from 1970 through 1975, nineteen of which were based on technology and nine of which involved complex economic matters. Lilley & Miller, *The New "Social Regulation"*, 47 PUB. INTEREST 49, 52 (1977). For example, in the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381-1431 (1976), Congress struck a compromise, perhaps unwittingly, between formal and informal rulemaking when it required the Secretary to file a "record of the proceedings," *id.* § 1394(a)(1), and authorized a reviewing court to order the taking of "additional evidence . . . before the Secretary," *id.* § 1394(a)(2). In the Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1976), Congress provided that "[t]he determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole." *Id.* § 655(f). Congress also required OSHA to provide a hearing when developing a rule. *Id.* § 655(b)(3). Both seem to be based on the notion that the agency should develop a more substantial factual basis for a rule than contemplated by the bare APA rulemaking procedures. *See* Industrial Union Department, AFL-CIO v. Hodgson, 499 F.2d 467, 473 (D.C. Cir. 1974) (legislative history of OSHA shows that Congress required procedures for rulemaking more formal than informal procedures of APA).

[51] *See* DeLong, *supra* note 17, at 290-92 (describing recent statutes requiring that agencies justify rules with "substantial evidence").

[52] *See* Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 392, 402 (D.C. Cir. 1973) (ordering EPA on remand to respond to industry's technical objections to promulgated standards), *cert. denied*,

Along with expanded procedures and more stringent judicial review, private parties were granted a more active role in rulemaking. Perhaps under the New Deal theory, the agency was relied upon to use its expertise to assess the competing values within our society and to distill what constituted the "public interest." Accordingly, private parties did not participate directly in a proceeding and, indeed, were excluded from participation because the agency's role was to reconcile the competing interests alone.[58] This view, too, was discarded.[59] The right of direct participation in the rulemaking proceeding was expanded[60] by

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417 U.S. 921 (1974); Kennecott Copper Corp. v. EPA, 462 F.2d 846, 850-51 (D.C. Cir. 1972) (ordering EPA on remand to supply basis on which agency reached promulgated standard).

[53] *See* United States v. Nova Scotia Food Prod. Corp., 568 F.2d 240, 252-53 (2d Cir. 1977) (dismissing government's complaint against manufacturer for violation of food and drug laws because Food and Drug Administration (FDA) failed to answer vital questions raised during comment period); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 648 (D.C. Cir. 1973) (remanding to EPA to conduct further proceedings to consider methodological feasibility of promulgated standard); Kennecott Copper Corp. v. EPA, 462 F.2d 846, 850-51 (D.C. Cir. 1972) (ordering EPA on remand to supply factual basis on which agency promulgated standard).

[54] Although it did not involve rulemaking, the Supreme Court's decision in CITIZENS TO PRESERVE OVERTON PARK, INC. v. VOLPE, 401 U.S. 402 (1971), set the tone for the increase in judicial review of rules that followed:

> [T]he court must consider whether the decision was based on a consideration of the relevant factors and whether there has been any clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

*Id.* at 416.

[55] *See* Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393, 402 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974) (remanding to EPA to explain methodology and scientific basis used to formulate standard).

[56] As one commentator has noted, "Prior to about 1970 the courts would uphold a rule unless it were demonstrably irrational." DeLong, *supra* note 17, at 286.

[57] The term "hard look" derives from Judge Leventhal's opinion in the licensing case of Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). Judge Leventhal commented in *Greater Boston Television* on the duty of an agency to look at the issues:

> If satisfied that the agency has taken a hard look at the issues with the use of reasons and standards, the court will uphold its findings, though of less than ideal clarity, if the agency's path may reasonably be discerned, though of course the court must not be left to guess as to the agency's findings or reasons.

*Id.* at 851. He made clear that the presumption of agency expertise is not sufficient to overcome a strict look at the agency's action: "Expertise is strengthened in its proper role as the servant of government when it is denied the opportunity to become 'a monster which rules with no practical limits on its discretion'. . . . 'The deference owed to an expert tribunal cannot be allowed to slip into judicial inertia.'" *Id.* at 850 (quoting Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n, 390 U.S. 261, 272 (1968)). Judge Leventhal's later opinions in *Portland Cement* and *International Harvester*, *supra* notes 52 & 50, are perhaps the epitome of the hard look standard of judicial review.

[58] *See* Williams, *supra* note 13, at 275 (agencies once considered to be representatives of public interest).

[59] *See* Stewart, *supra* note 3, at 1748-52 (wide variety of private interests which will be affected by administrative action may be represented by private parties through participation in administrative proceedings and in seeking judicial review of administrative action).

[60] The Supreme Court in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978), called a halt to the imposition by lower courts of additional procedures beyond those provided in the APA and the respective substantive statutes. The Court stated:

requiring hearings and by forcing agencies to respond to the parties' arguments.[61] The New Deal "expert" model of administrative agencies was repudiated in fact, if not expressly.

Moreover, Congress imposed entirely new controls to protect the impartial rationality of the agency's decision. The Federal Advisory Committee Act,[62] the Sunshine Act[63] and its ex parte rules,[64] and the Freedom of Information Act[65] were all directed toward increasing the accountability of agencies. The goal of such legislation was to require an agency to make up its own mind, untainted by partisan influence, and to subject the decision to public inspection to ensure that it considered only the proper factors.

Changes also occurred on the political level. The White House undertook an increasingly activist role in influencing the exercise of agencies' discretion[66]

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"Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are not free to impose them if the agencies have not chosen to grant them." *Id.* at 524. The concern seems to be that by excessively relying on courtroom techniques to the exclusion of the informal give and take, courts over-formalize the informal rulemaking process. *See* DeLong, *supra* note 17, at 315 (*Vermont Yankee* manifests fear of judicializing informal rulemaking by increasing procedural requirements); *see also supra* note 17 (discussing *Vermont Yankee*); *cf. supra* note 28 (citing 1941 FINAL REPORT of the Attorney General's Committee on Administrative Procedure, which recommended holding informal conferences among interested parties because such practice allows for give and take).

[61] *See* Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 392, 402 (D.C. Cir. 1973) (ordering EPA to respond to industry's technical objections to promulgated standards).

[62] 5 U.S.C. app. §§ 1-15 (1976).

[63] Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241-48 (1976) (codified in scattered sections of U.S.C.); *see id.* § 3(a) (codified at 5 U.S.C. § 552b (1976)) (providing for open meetings of certain agency proceedings).

[64] Administrative Procedure Act, Pub. L. No. 89-554, § 554(d), 80 Stat. 381, 384 (1966) (codified at 5 U.S.C. § 554(d) (1976)) (prohibiting ex parte contacts between judicial officer and interested parties during adjudication); Government in the Sunshine Act, Pub. L. No. 94-409 § 4(a), 90 Stat. 1241, 1246-47 (1976) (codified at 5 U.S.C. § 557(d) (1976)) (prohibiting ex parte communications between interested persons and agency personnel involved in decision making during and after hearings conducted for adjudication and formal rulemaking). *See* Home Box Office, Inc. v. FCC, 567 F.2d 9, 57 (D.C. Cir.) (once notice of proposed rulemaking issued, no agency official should discuss related matters with interested party; if ex parte contact occurs, any communication must be placed in public file for comment by interested parties), *cert. denied*, 434 U.S. 829 (1977).

[65] 5 U.S.C. § 552 (1976 & Supp. IV 1980) (requiring agencies to make public agency rules, opinions, orders, records, and proceedings).

[66] Executive Orders 12,291, 12,044 and 11,821, *supra* note 8, required agencies to consider the cost of their actions for at least the major rules. In 1974 Congress created the Council on Wage and Price Stability to monitor federal agencies to determine the extent to which their activities contributed to inflation. Council on Wage and Price Stability Act, Pub. L. No. 93-387, § 3(a)(7), 88 Stat. 750, 750 (1974), *reprinted in* 12 U.S.C. § 1904 (1976), *amended by* Pub. L. No. 93-449, § 4(e), 88 Stat. 1364, 1367 (1974), Pub. L. No. 94-78, §§ 2(a), 3-7, 89 Stat. 411, 412 (1975), Pub. L. No. 95-121, § 6, 91 Stat. 1091, 1092 (1977), Pub. L. No. 96-10, §§ 1-5, 96 Stat. 21-23 (1979). *See* J. MILLER & B. YANDLE, BENEFIT-COST ANALYSES OF SOCIAL REGULATION 5-6 (1979) (Council on Wage and Price Stability created to monitor inflationary activities of private sector and federal agencies; agencies had to estimate benefits and costs of major rulemaking). The council also had the authority to intervene in a proceeding before an agency if it believed that a possible outcome of the proceeding would have an inflationary impact. Pub. L. No. 93-387, § 3(a)(8), 88 Stat. at 751. The authority conferred by the act expired by the terms of the act on September 30, 1980. *Id.* § 7.

President Carter established the Interagency Regulatory Analysis Review Group to review the agencies' identification of the costs and benefits of their actions, their explanations of whether they had chosen the most cost effective solution, and their explanations of why they had selected a certain solution. *See* Eads, *Harnessing Regulation*, REGULATION, May-June 1981, at 19-20. The Reagan administration has consolidated oversight functions of both the Council and the interagency group in the Presidential Task Force on Regulatory Relief, chaired by the Vice President and staffed by the Office of Information and Regulatory Affairs of the Office of Management and Budget. *Id.*

and in coordinating disparate and sometimes conflicting national goals.[67] Congress placed the bulk of the vast number of new programs squarely in the executive branch and generally rejected the New Deal notion of insulating agencies from political control through the creation of "independent" agencies that combined the three functions of government.[68] At times, especially in the environmental field, Congress abandoned the concept of broad discretion by requiring the agency to achieve specified goals, to set its regulatory goals in advance, and to establish by rule the means for achieving those goals.[69] Moreover, all of these requirements were to be accomplished in public proceedings rather than through reliance on the internal workings of an expert staff.[70] In addition, Congress attempted to control the agency's exercise of discretion through more frequent use of a legislative veto enabling Congress to invalidate a rule promulgated by an agency.[71]

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[67] *See* Sierra Club v. Costle, 657 F.2d 298, 312, 404-408 (D.C. Cir. 1981) (during EPA rulemaking on air pollution emission standards, the President, his staff, and high ranking officials of executive branch met to discuss issues presented by proposed rulemaking; court held meeting did not violate procedural rule prohibiting ex parte meetings after comment period); AMERICAN BAR ASSOCIATION, COMMISSION ON LAW AND THE ECONOMY, FEDERAL REGULATION: ROADS TO REFORM 68 (1979) (making wise balancing choices among courses of action that pursue one or more conflicting and competing objectives one central task of modern democratic government); Ackerman & Hassler, *supra* note 7, at 1542 (discussing executive branch intervention into rulemaking challenged in *Sierra Club v. Costle*).

[68] The Consumer Product Safety Commission, established by the Consumer Product Safety Act § 4, 15 U.S.C. § 2053 (1976), and the Commodity Futures Trading Commission, established by the Commodity Futures Trading Act § 2(a)(2)-(11), 7 U.S.C. § 4a (1976 & Supp. IV 1980), are throwbacks to the New Deal concept of an independent agency. Each may promulgate rules, prosecute violations, and adjudicate violations. 7 U.S.C. § 4a; 15 U.S.C. § 2053. The Federal Election Commission (FEC) may also issue rules. Federal Election Commission Act § 310(a)(8), formerly § 311, added by Pub. L. No. 93-443, § 208(a), 88 Stat. 1263, 1282 (1974), renumbered by Pub. L. No. 94-283, § 105, 90 Stat. 475, 481 (1976), 2 U.S.C. § 437d(a)(8) (1976 & Supp. IV 1980). Although the FEC may issue subpoenas for investigation and seek an accommodation with those whom it believes may be violating the law, it must bring a civil action in court to enforce the law. *Id.* § 310(g), 2 U.S.C. § 437(g). The Occupational Safety and Health Review Commission (OSHRC) hears cases brought to contest citations issued by the Occupational Safety Administration (OSHA), Occupational Safety and Health Act § 12(i), 29 U.S.C. § 661(i) (1976 & Supp. IV 1980), but does not have policy making authority. The Federal Mine Safety and Health Review Commission has similar authority and structure with respect to mining. Federal Mine Safety and Health Review Commission Act, 30 U.S.C. § 823 (1976 & Supp. IV 1980). The Merit Systems Protection Board was created as part of the reorganization of the duties of the former Civil Service Commission. Merit Systems Protection Act § 202(a), 5 U.S.C. § 1201 (1976 & Supp. IV 1980). The Postal Rate Commission, 39 U.S.C. § 3661 (1976), resulted from the reorganization of the Post Office. *Id.* The Equal Employment Opportunity Commission (EEOC) does not have the authority to issue rules and may seek only voluntary compliance or bring civil actions against employers or unions. Equal Employment Opportunity Act § 706(b), (f)(1), 42 U.S.C. §§ 2000e-5(b), (f)(1) (1976). The EEOC, however, may promulgate rules to prohibit discrimination in employment by the federal government. Exec. Order. No. 12,106, *reprinted in* 42 U.S.C. § 2000e-4 app. at 600-01 (Supp. IV. 1980)

[69] *See* Clean Air Act Amendments of 1970 § 109, 42 U.S.C. § 7409 (1976 & Supp. IV 1980) (requiring EPA to promulgate by regulation air quality standards which specify level of air quality requisite to protect public welfare); *see also* Ackerman & Hassler, *supra* note 7, at 1474-79 (Clean Air Amendments forced EPA to specify its ends more clearly than required by New Deal model).

[70] *See supra* notes 62-65 (discussing FACA, Sunshine Act and its ex parte rules, and FOIA).

[71] Federal Trade Commission Improvements Act (FTCIA), 15 U.S.C. § 57a-1 (Supp. IV 1980) (Federal Trade Commission must submit promulgated rules to Congress; rules become effective unless both houses of Congress adopt concurrent resolution disapproving such rule); HOUSE COMM. ON RULES, 96TH CONG., 2D SESS., STUDIES ON THE LEGISLATIVE VETO 1 (Comm. Print 1980) (summarizing uses of legislative veto); *see generally* Scalia, *The Legislative Veto: A False Remedy for System Overload*, REGULATION, Nov.-Dec. 1979, at 19 (criticizing legislative veto). The United States Court of Appeals for the District of Columbia Circuit recently declared § 57a-1 of the FTCIA unconstitutional. Consumers Union v. FTC, No. 82-1737, slip op. at 6 (D.C. Cir. Oct. 22, 1982). The court relied on its

These changes coalesced[72] to convert the agency from an expert guardian of the public interest to a form of "umpire,"[73] albeit an active one. An agency now must review the issues involved in a proposed regulation and make an initial, tentative determination of the factual basis to support a proposed rule.[74] During this developmental process, and certainly once the rulemaking proceeding begins, interested persons may submit factual data and policy arguments that the agency must consider in reaching its final decision on the rule.[75] The agency, like an umpire, then assesses the competing contentions, those of the various parties and of its own staff, and weighs the relevant facts and policy in light of the criteria of the statute under which the agency operates.

The parties' participation is a method of ensuring that the agency has adequate information on which to base its action.[76] Participation also has an important additional role. To the extent that the agency is "bound" by the record of the rulemaking proceeding, the parties can confine the range of discretion available to the agency through the development of the rulemaking record.[77]

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decision in Consumers Energy Council of America v. FERC, 673 F.2d 425 (D.C. Cir. 1982), *appeal docketed*, 51 U.S.L.W. 3099 (U.S. Aug. 2, 1982).

[72] More accurately, the changes occurred piecemeal in response to the perceived failures of the expert model of the agency and its regulatory programs.

[73] Williams, *supra* note 13, at 276 (agency no longer acts as policymaker representing the public by merely hearing point of view of parties and then making its decision, but rather now acts like umpire in reaching policy decisions as result of adversary activity of competing groups). In Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), however, the United States Court of Appeals for the Second Circuit explicitly stated that agencies should not be considered umpires:

> In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.

*Id.* at 620. This passage is cited with approval in Calvert Cliffs Coordinating Committee v. United States Atomic Energy Commission, 449 F.2d 1109, 1119 n.21 (D.C. Cir. 1971). This court's statement is not inconsistent with the analysis in this article because the Second Circuit used the term umpire in a different sense than it is used in this article. In *Scenic Hudson Preservation Conference*, the court meant only that the agency may not sit back passively and rely exclusively on the parties to raise issues and present facts before the agency is obligated to consider them. *See* 354 F.2d at 620-21 (Federal Power Commission (FPC) has affirmative duty to take the initiative to inquire into and consider all relevant facts). The *Scenic Hudson* court required that the agency's action be supported by an adequate exploration of the issues and the facts even if the agency itself must develop them. *Id.* As the term is used in this article, the agency acts as an "umpire" in that parties participate to a far greater extent than under the New Deal model, and the agency itself is called upon to resolve their competing contentions. The Supreme Court also has made clear that intervening parties have a responsibility to raise and support issues in which they are interested so that the agency may consider their position. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 553-54 (1978); Rodgers, *A Hard Look at* Vermont Yankee: *Environmental Law Under Close Scrutiny*, 67 GEO. L.J. 699, 719 (1979).

[74] *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE fl 6.2, at 452 (1978) (under APA, agency must analyze and consider all relevant matter in determining factual basis of rule).

[75] International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 648 (D.C. Cir. 1973) (EPA must make reasoned presentation of reliability of its methodology to overcome prima facie conclusion supported by evidence submitted by industry as interested party); *see also supra* note 20 (discussing legislative history of APA showing that agency must analyze all relevant matters presented).

[76] *See* Eisenberg, *supra* note 29, at 417 (requiring the agency to pay attention to the parties' proofs and arguments serves purpose of assuring that decisions well informed); *supra* notes 44-47 and accompanying text (discussing function of parties participation in rulemaking).

[77] Some may object to the use of the word "record" to define the collection of material developed by an agency in support of a rule and the submissions of private parties concerning the rule, on the ground that the word "record" connotes something far more formal than such a collection and gener-

The record of the rule must reflect that the agency considered the appropriate issues[78] and must contain substantial support for factual determinations.[79] Thus, the parties could exercise some control over an agency's discretion by participating in the hybrid process *if* all the issues could be resolved simply by conducting factual research and placing it in the record.

Rulemaking proceedings, however, rarely turn on such clearly delineated issues. Agencies frequently must make decisions on inadequate, incomplete, and generally unsatisfactory evidence.[80] This is either because it would take too long to develop a consensus by means of the normal scientific method of the publication of results, peer comment, and replication of work by impartial observers,[81] or because the question lies beyond current scientific or technical abilities.[82] Moreover, even if the best possible evidence were adduced, major policy questions would remain. The United States Court of Appeals for the District of Columbia Circuit observed:

> From extensive and often conflicting evidence, the Secretary in this case made numerous factual determinations. With respect to some of those questions, the evidence was such that the task consisted primarily of evaluating the data and drawing conclusions from it. The court can review that data in the record and determine whether it reflects substantial support for the Secretary's findings. But some of the questions involved in the promulgation of these standards are on the frontiers of scientific knowledge, and consequently as to them insuffi-

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ally would mean documentary material that is accepted into evidence along with sworn testimony. To overcome such an objection, at least one current regulatory reform bill refers to the rulemaking "file" instead of "record." S. 1080, 97th Cong., 1st Sess. § 2(c)(1)(F) (1981). This article uses the term "record" because it has a long history. *See* Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 62-63 (1975) (discussing use and meaning of term "record"). Moreover, the term adequately describes the materials the agency considers in developing a rule. It is not meant to be limited to material that can be accepted into evidence in a formal proceeding. *See* Administrative Conference of the United States, Pre-enforcement Judicial Review of Rules of General Applicability, Recommendation No. 74-4, 1 C.F.R. § 305.74-4(1) (1981) (in statutes pertaining to judicial review of rules adopted under Administrative Procedure Act, 5 U.S.C. § 553, "record" means notice, comments and documents submitted by interested persons, transcripts, other factual information considered, reports of advisory committees, and agency's concise general statement or final order).

[78] *See supra* notes 12 & 20 (discussing legislative history of APA indicating that APA requires statement of basis and purpose of rule and indication that agency considered positions of parties); *supra* note 52 and accompanying text (discussing judicially imposed procedural requirements additional to APA).

[79] This means, of course, that the agency must not only be able to show material that fairly supports its position, but that it must discount that material by data pointing in a contrary direction. Aqua Slide 'N' Dive Corp. v. Consumer Prod. Safety Comm'n, 569 F.2d 831, 838, 841 (5th Cir. 1978) (setting aside standard that was not supported by substantial evidence, in part because agency failed to rebut interested parties' objections); *cf.* United States v. Nova Scotia Food Prod. Corp., 568 F.2d 240, 252 (2d Cir. 1977) (agency may not leave unanswered vital questions raised by cogent, material comments); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 392, 402 (D.C. Cir. 1973) (ordering EPA on remand to respond to industry's technical objections to promulgated standards), *cert. denied*, 417 U.S. 921 (1974).

[80] *See* M. WESSEL, SCIENCE AND CONSCIENCE 144-45 (1980) (resolution of socioscientific disputes must be accomplished on basis of incomplete, inadequate research because issues must be resolved before completion of research).

[81] *Id.* at 42-43, 144-45.

[82] *See* McGarity, *Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA*, 67 GEO. L.J. 729, 729 (1979) (agencies and courts often must resolve scientific questions about which there is much uncertainty and dispute in scientific community).

> cient data is presently available to make a fully informed factual determination. Decision making must in that circumstance depend to a greater extent upon policy judgments and less upon purely factual analysis. Thus, in addition to currently unresolved factual issues, the formulation of standards involves choices that by their nature require basic policy determinations rather than resolution of factual controversies.[83]

Although parties participate in the rulemaking process by presenting facts and arguments through procedures tailored more to develop the factual basis of rules than to reach agreement on policy,[84] policy questions ultimately are decided largely by the agency. The agency virtually always retains a broad range of discretion, the exercise of which involves inherently political choices. For example, the agency decides which "facts" are relevant to the decision and how to reconcile such competing values as energy development versus environmental protection, or safety versus costs.[85] The statutes usually provide little guidance.[86] Commenting on this lack of guidance, Professor Jaffe stated that "Where in form or in substance the legislative design is incomplete, uncertain, or inchoate, a political process will take place in and around the agency, with the likely outcome a function of the usual variables which determine the product of lawmaking institutions."[87] Professor Stewart characterized the problem similarly:

> Today, the exercise of agency discretion is inevitably seen as the essentially legislative process of adjusting the competing claims of various private interests affected by agency policy. . . .
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> . . . [T]he application of legislative directives requires the agency to reweigh and reconcile the often nebulous or conflicting policies behind the directives in the context of a particular constellation of affected interests. The required balancing of policies is an inherently

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[83] Industrial Union Dept., AFL-CIO v. Hodgson, 499 F.2d 467, 474-75 (D.C. Cir. 1974). As one commentator has noted,

> Disputes over standard-setting arise in large part because traditional approaches to regulation, and the administration of regulations, do not work as intended. In theory, experts or specialists are supposed to set guidelines based on objective scrutiny of the best scientific information available to them. Yet, every standard also involves an assessment of risks and a decision about the distribution of costs and benefits. Although the process of setting environmental quality standards involves technical analysis, it also involves subjective or political judgments. Furthermore, when standards are set on the basis of analyses prepared by the staffs of regulatory agencies that are suspected of not being neutral, but are sympathetic to the interests they are supposed to be regulating, the prospect of conflict increases. Both development and environmental interests have come to suspect that regulatory agencies are more sympathetic to the other side.

Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 13 (1981).

[84] The parties may, of course, make policy arguments and seek to persuade the agency as to the wisdom of their position. The current method of judicial review, however, seems to require an agency to demonstrate more rigorously why it makes the factual determinations that support its rule than why it makes policy choices.

[85] An excellent review of the literature discussing the nature of the value choices the agency must make in establishing almost any significant regulation appears in SENATE COMM. ON THE JUDICIARY, THE REGULATORY REFORM ACT, S. REP. NO. 284, 97th Cong., 1st Sess. 52-64 (1981).

[86] T. LOWI, *supra* note 3, at 117.

[87] Jaffe, *supra* note 2, at 1189.

discretionary, ultimately political procedure.[88]

The resolution of these political questions has resulted in a crisis of legitimacy that is the current malaise.[89] Agency actions no longer gain acceptance from the presumed expertise of its staff.[90] It is no longer viewed as legitimate simply because it fills in the gaps left by Congress, or because it is guided by widely accepted public philosophy. To the extent that rulemaking has political legitimacy, it derives from the right of affected interests to present facts and arguments to an agency under procedures designed to ensure the rationality of the agency's decision.[91] Although this process confines and narrows agency discretion, it does not provide a forum suitable for the resolution of the political questions or for the exercise of subtle value choices.[92]

Political decisions necessarily have no purely rational or "right" answer. Yet, the current regulatory procedures do not permit the parties to participate directly—to share in reaching the ultimate judgment, which is what provides the legitimacy to political decisions. Although the agency, like the umpire, makes the decision alone,[93] a multitude of political forces influence that decision. Because there is no overriding or generally accepted reason to have faith in the choices made by the agencies,[94] rules issued after even the most ardent hybrid process lack legitimacy.

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[88] Stewart, *supra* note 3, at 1683-84. Professor Stewart continues,

> The ideal of rational decision assertedly consists in the best resolution and harmonization of conflicting interests, but since there is generally no agreed-upon criterion of what constitutes a "best solution," decisionmaking will normally be a question of preferring some interests to others. After even the most attentive consideration of the contending affected interests, there is still the inescapable question of the weight to be accorded to each interest and the values invoked in its support. Statutory directives will generally be of little assistance in assigning weights to the various affected interests, since the problem of broad agency discretion generally grows out of a legislative inability or unwillingness to strike a definitive balance among competing values and interest groups.

*Id.* at 1779.

[89] J. FREEDMAN, *supra* note 38, at 6-7 (agency exercise of lawmaking powers without political accountability of legislature and exercise of adjudicatory power without the tenure and independence of judiciary has led to recurrent sense of crisis); T. LOWI, *supra* note 3, at 92-126 (agency regulation without sufficient legislative direction has resulted in "policy without law" and "decline of law").

[90] Indeed, because complex scientific and technical issues are involved in many rulemakings, rarely will a member of the agency's staff be a recognized authority in the subject matter.

[91] This appears to be the goal of the multitude of judicial decisions and most of the recently proposed legislation. *See supra* notes 52-71 and accompanying text (discussing development of more stringent judicial review of agency decisions and recent legislation providing parties with more active roles and ensuring rationality of decisions).

[92] Susskind & Weinstein, *Toward a Theory of Environmental Dispute Resolution*, 9 B.C. ENVTL. AFF. L. REV. 311, 324 (1980) ("environmental disputes are at least as much value disputes as scientific controversies").

[93] As one commentator describes the decisionmaking process:

> In the U.S., there was essentially a two-step decision-making process, one that is repeated again and again when new regulatory agencies deal with mega-problems. In the first step, a small group of agency officials . . . decide on the contents of the final regulation. They do this in isolation, and their decision is a secret until they announce it. These officials rely, of course, on the hearing record, posthearing submissions, and their own expertise, but they write the regulation by themselves, and none of the parties who will be directly affected by the decision know what the decision will be until it is published. Until the announcement, these parties must make do with rumor and suspense.

J. BADARACCO, A STUDY OF ADVERSARIAL AND COOPERATIVE RELATIONSHIPS BETWEEN BUSINESS AND GOVERNMENT IN FOUR COUNTRIES: A REPORT TO THE OFFICE OF TECHNOLOGY STRATEGY AND EVALUATION OF THE U.S. DEP'T OF COMMERCE 212 (1981).

[94] Complaints about the policy judgments of agencies are, of course, legion. One commentator

Hybrid rulemaking has become a surrogate for direct participation in the political decision because parties have no means of direct participation in the policy choice. Parties can limit the agency's range of choices only by influencing the record.[95] As a result, the process of developing the record has become bitterly adversarial.[96] Such adversity may be an inevitable concomitant of the regulatory state in which massive costs and benefits are at stake; it may even be the best way of reaching many decisions. This adversarial system, however, fails to provide a mechanism for deciding the inherently political issues in a politically legitimate way. Groups affected by a regulation need the opportunity to actually participate in its development if they are to they have faith in it. A participatory process would have positive merit in and of itself because a resulting regulation would be based on the consensus of those who would be affected by it, which is, after all, the nature of political decisionmaking.[97] Achieving the consensus of interested parties would also reduce many of the problems caused by the current adversarial process of developing regulations.[98] Before considering administrative decisionmaking based on consensus, the next section evaluates the advantages and disadvantages of the adversarial process.

## II. THE ADVERSARIAL PROCESS

### A. BENEFITS OF THE ADVERSARIAL PROCESS

The adversarial process has many benefits.[99] It provides a strong incentive for those interested in the outcome to develop and present factual and policy arguments for the decisionmakers to consider. Thus, the adversarial process is

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summarizes the broad disquiet with which regulatory decisions are viewed: "[E]nvironmentalists and developers agree that government regulatory agencies figure costs and benefits incorrectly. Environmentalists argue that environmental protection is still being undervalued. Developers contend that arbitrary and time-consuming regulatory requirements add unnecessarily to the cost of doing business." Susskind, *supra* note 83, at 11; *see also* Stewart, *supra* note 3, at 1684-88 (compiling many of complaints about agency policy decisions). Many theories are offered to explain why agencies make the policy choices they do. *See generally* Schuck, Book Review, 90 YALE L.J. 702 (1981) (reviewing THE POLITICS OF REGULATION (J. Wilson ed. 1980)).

[95] Address by Senator William V. Roth, Jr., before the Plenary Session of Administrative Conference of the United States (December 11, 1981) (party's main tool to control agency's discretion in adversarial rulemaking process is to influence the record on which the agency bases its rule).

[96] Murray Weidenbaum, former Chairman of the Council of Economic Advisors, wrote, "The relationship between business and government in the United States can be described as being basically adversarial in nature." Weidenbaum, *A New Model of Governmental Decision Making*, in THE BUSINESS-GOVERNMENT RELATIONSHIP: A REASSESSMENT 65, 65 (N. Jacoby ed. 1975); *see also* Fox, *Breaking the Regulatory Deadlock*, HARV. BUS. REV., Sept.-Oct. 1981, at 97, 97 (most dealings between business and government are adversarial); Reich, *Regulation by Confrontation or Negotiation?*, HARV. BUS. REV., May-June 1981, at 82, 83 (same); Note, *Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking*, 94 HARV. L. REV. 1871, 1871 (1981) (current proposal for administrative reform responds to criticism that regulatory process is excessively adversarial).

[97] Properly implemented, a consensus solution "depends for its legitimacy not upon its objective rationality, inherent justice, or the moral capital of the institution that fashioned it, but upon the simple fact that it was reached by consent of the parties affected." Schuck, *Litigation, Bargaining, and Regulation*, REGULATION, July-Aug. 1979, at 26, 31.

[98] "What is needed is a new view of the proper role of an agency. . . . [A]gencies should be viewed not primarily as decisionmakers in contested cases, but as a means of helping the parties in such cases work out a result that is both mutually acceptable and in the public interest." Morgan, *supra* note 24, at 55.

[99] Schuck, *supra* note 97, at 26.

a powerful means of generating information.[100] Because it ensures that each party knows the contentions of the others, each participant can demonstrate the errors in the competing positions.[101] The adversarial process, therefore, functions as a quality control pointing out errors and weaknesses in any position. It also satisfies a deeply held belief that anyone affected by government decisions should have the opportunity to present his case to the agency making the decision in a way that forces the agency to consider the argument.[102] It is a way of permitting affected parties to convince the decisionmaker that the party's position should prevail.[103]

### B. DRAWBACKS OF THE ADVERSARIAL PROCESS

On the other hand, the adversarial process has many drawbacks. The agencies and the private parties tend to take extreme positions, expecting that they may be pushed toward the middle. For example, an agency may propose a far more stringent regulation than it expects to issue ultimately because it expects the adversarial process to create considerable pressure for it to moderate its position.[104] Moreover, if the agency tempers its original proposal, the agency appears reasonable and responsive.

The private participants tend to take extreme positions because they also expect to be drawn toward the middle as part of the adversarial process. Participants that oppose any regulation or that hope to obtain a minimally intrusive regulation may argue that no regulation is needed or that at most a weak one is required, and will tailor their evidence accordingly.[105] Because the parties advocate the extreme,[106] they may be reluctant to provide data to the agency and to each other because they fear the data may be misused or reveal weaknesses in the extreme position.[107] Thus, it is frequently difficult for parties to join forces, and frontally address the factual and policy questions. Instead, the parties dig in and defend their extreme positions.[108]

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[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] Eisenberg, *supra* note 29, at 414-15.

[104] *See* J. BADARACCO, *supra* note 93, at 184 (when setting vinyl chloride emission standard, OSHA proposed extreme limit of "no detectable level").

[105] *See* Reich, *supra* note 96, at 89 (professional representatives of interested parties often present extreme characterization of issues).

[106] *See* Interview with Anthony Z. Roisman, Hazardous Waste Section, Lands Division, United States Department of Justice, (May 6, 1981) [hereinafter Roisman Interview] (parties take extreme positions during rulemaking at Nuclear Regulatory Commission because they may challenge rule if the agency does not accept their position; at the challenge stage, they provide good data and more reasonable negotiating position) (copy on file at *Georgetown Law Journal*).

[107] In American Textile Mfg. Institute, Inc. v. Donovan, 452 U.S. 490 (1981), an industry representative supplied OSHA with a cost estimate for industry compliance with cotton dust standard. *Id.* at 523. In reference to the cost estimate, the industry representative stated, "I'm beginning to wish I hadn't said anything about this, which I did, and [now] I have to be helpful." *Id.* at 528 n.51. *See* Interview with James A. Rogers, formerly Associate General Counsel, EPA, (April 15, 1981) [hereinafter Rogers Interview] (parties hold back data during rulemaking at EPA because they distrust government, fearing that it will not understand nuances and limitations on data) (copy on file at *Georgetown Law Journal*).

[108] *See* M. WESSEL, *supra* note 80, at 48 (people use "sporting" tools of regulatory process, including extreme positions, to achieve goals); Fox, *supra* note 96, at 97 (regulatory procedures encourage exorbitant demands and dramatic presentations).

In addition, the adversarial process affects the presentation of proposals when people deal with each other as adversaries. A party is likely to encounter difficulty in expressing its true concerns[109] because it may fear losing on issues of minor interest without gaining concessions on those it cares about a great deal. Moreover, a party may feel compelled to advocate a position it may not actually favor at the time to preserve the option of advocating that position in the future. Thus, the parties' presentations appear flat: they raise every issue to nearly equal prominence and place far more issues in contention than may be necessary.

The parties in an adversarial process do not deal directly with one another; rather, each makes its presentation to the decisionmaker. Because of this presentation, the issues in controversy may be limited to those within the jurisdiction of the forum. These issues, however, may not be the ones actually separating the parties. For example, one wonders whether the challenge to the Tellico Dam in *Tennessee Valley Authority v. Hill*[110] was prompted by a grave concern for the endangered snail darter[111] or by a broader opposition to the adverse effect on the environment and human life. If the parties are unable to define the true issues of concern, the decisionmaker and the other parties will have difficulty in addressing the parties' positions and in making informed trade offs when developing the factual basis of a rule and striking the inherently political choice embodied therein.[112]

The adversarial process is also unsuitable for resolving polycentric disputes involving many parties and many possible outcomes. Moreover, any one decision necessarily affects every other issue involved in the particular dispute.[113] Although polycentric disputes require delicate trade offs among competing interests, they are often resolved through the adversarial process, whose very nature precludes such balancing. Professor Fuller's hypothetical about the distribution of paintings by various artists among competing claimants is a classic illustration of polycentric decisionmaking.[114] The distribution of one painting necessarily affects each claimant because it alters the universe of paintings available for distribution to all the claimants.[115] An adversarial approach may force the decisionmaker to put a monetary value on the respective paintings and to attempt to distribute them so that each claimant receives paintings of equal monetary value. Such an approach obviously would ignore the actual values placed on the paintings by the various parties. The assignment of monetary value would be a surrogate for the decision because the forum was incapable of deciding the true question. Analogous questions arise in the regulatory context in which agencies must balance widely competing views and national needs.[116]

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[109] *See* Dunlop, *The Limits of Legal Compulsion, reprinted in* 1975 O.S.H. REP. (BNA) 884, 886 (Nov. 12, 1975) (regulation lessens incentives for private accommodation of conflicting viewpoints; in contrast, negotiation forces parties to set priorities among their demands).

[110] 437 U.S. 153 (1978).

[111] *Id.* at 158.

[112] Professor Stewart describes this difficulty as "a legal version of blindman's bluff." Stewart, *Regulation, Innovation, and Administrative Law: A Conceptual Framework*, 69 CALIF. L. REV. 1256, 1346 n. 272 (1981).

[113] *See* Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394 (1978) (making decision affects issues in other decisions to be made); Boyer, *supra* note 30, at 116-17 (same).

[114] Fuller, *supra* note 113, at 394.

[115] *Id.*

The adversarial process also causes parties to engage in defensive research to bolster the factual record for a proposed rule.[117] An agency and other affected parties may feel compelled to compile a great amount of factual material to counter other positions and to build affirmative cases, although such information may be of only marginal value in making the ultimate decision. This research, which may take the form of data gathering, new laboratory work, or the employment of recognized leaders in a field, is both time consuming and expensive. Moreover, the adversarial process tends to warp the quality of the scientific and technical information submitted. Because the parties must develop the best arguments for the positions they advocate, qualifications, limitations, and expressions of doubt are lost. We have grown accustomed to rulemaking procedures that take several years to complete at the agency level and, in the event judicial review is sought, another year or two in the courts. The cost of participating in such a proceeding for both the agency and the private parties can be staggeringly high.

The adversarial process also breeds specialists whose expertise is the process itself. These "intermediaries," as Professor Reich has called them,[118] serve as modern knights who joust with each other at the behest of the actual parties in interest and supply their principals with intelligence about the others' actions.[119] The intermediary is the architect and advocate of an interest's position in the proceeding. He uses available processes to achieve the goals and tends the political contacts that will shape the final decisions.[120]

To a degree, the use of intermediaries in the regulatory process reflects nothing more than a specialization of functions. As Reich points out, however, intermediaries sell conflict,[121] which in turn exacerbates the problems of the adversarial process.[122] Not only does an intermediary have little incentive to minimize conflict, he usually lacks the substantive ability and authority to make trade offs with the opposing participants.

Thus, although the principals themselves bear the responsibility for decisions, their responsibility is filtered through the intermediary. This process may interfere with their ability to reach an early satisfactory agreement. It has been observed, for example, that once an adversarial process begins, the senior management of a company tends to turn decisionmaking responsibility over to the legal staff.[123] Although the management is trained to decide what is in the best interests of the firm, it plays a less active role once adversarial proceedings begin. Studies suggest that this process is counterproductive. For example, experiments with the litigation process have been conducted in which a third party expert and the senior management of the opposing parties were presented with an abbreviated version of the issues in a dispute. The expert then acted as an adviser rather than as a decisionmaker.[124] The parties reached an accommodation on the issues without the years of litigation.[125] The use of a third party expert as an adviser thus eliminated the intermediary and facilitated agreement.

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[116] C. SCHULTZE, THE PUBLIC USE OF PRIVATE INTEREST 12 (1977) (most important characteristic of "social intervention" by the government is that its success depends on affecting skills, attitudes, consumption habits, or production patterns of millions of individuals and business firms and thousands of local governments); *See* Boyer, *supra* note 30, at 118 (discussing examples of agency actions that affect wide variety of interests that make it necessary to choose among many possible solutions).

[117] *See* Morgan, *supra* note 24, at 24-25 (discussing delay in ratemaking proceedings caused by factbuilding).

[118] Reich, *supra* note 96, at 84.

[119] *Id.*

[120] *Id.* at 85.

[121] *Id.* at 86-89.

[122] One commentator quipped in commenting on Reich's thesis, "If the only tool you've got is a hammer, then everything looks like a nail." J. DeLong, Letter to the Editor, HARV. BUS. REV., July-Aug. 1981, at 55, 165. DeLong notes that intermediaries tend to escalate the relationship between a private party and an agency into an adversarial one, regardless of whether the adversarial process is necessary or whether it is the best way to address the issues at hand. *Id.*

A similar phenomenon occurs in adversarial rulemaking. The principals, who are responsible for assessing their organization's best interests in the context of the issues raised in the proceeding, generally are not direct participants. Lawyers and other intermediaries frame the issues and lend advice to the decisionmakers. This system then adds to the formality and structure of the process and further breaks down the ability of the regulatory process to address the issues directly.[126] Finally, because the adversarial process pits one party against another, those who are not victorious may believe that the decision is not legitimate because it did not fully credit their position. This perceived lack of legitimacy may reduce voluntary compliance, which is the mainstay of the regulatory process.[127]

### C. THE COMPLAINTS AND THE RESPONSE

The deficiencies of the adversarial process have been overdrawn to emphasize that adversarial rulemaking inhibits the dialogue[128] over and exploration of creative solutions necessary to resolve the vexing problems addressed by agency regulation. Because we lack both a public philosophy that legitimizes agency decisions and a process by which political decisions involved in regulations can be thrashed out directly,[129] we use the surrogate of constraining and influencing the exercise of discretion through the development of a record and judicial review.[130] As long as the political acceptance of a regulation rests on the ability of interested parties to participate in building the record and on the rationality of the agency's decision, it will remain essential to improve the procedures leading to those ends. Such improvements will merely continue the adversarial process.[131]

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[123] *Business Saves Big Money with the Minitrial*, Business Week, October 13, 1980, 168, 168.

[124] *See id.* (describing minitrial procedure with third party adviser); *see also* Johnson, Massi & Oliver, *Minitrial Successfully Resolves NASA-TRW Dispute*, Legal Times of Washington, Sept. 6, 1982, at 16, 17 (describing minitrial without adviser).

[125] *See* Green, Marks & Olson, *Settling Large Case Litigation: An Alternate Approach*, 11 Loy. L.A.L. Rev. 493, 496 (1978) (corporate management insulates itself from litigation, believing complexities of litigation require legal expertise).

[126] Irving Shapiro, former chairman of the E.I. DuPont deNemours Company and of the Business Roundtable, lamented this fact:

> We . . . have a lot of talent. A lot of those people are very expert in their fields, and once they've put their minds onto it, they can come up with answers. That doesn't happen very often. Instead, the system says we must be adversaries. . . . [The current regulatory process] is absolutely too cluttered up. It's got too many people tied up in knots. What it is today, really, is an adversary procedure in which you've got single-issue groups on one side pressing the agency, you've got people in the agency pressing for their own viewpoint, and then you've got people in the industry pressing for their viewpoints, and each one is shooting at the other.

*DuPont's Irving S. Shapiro: Summing Up a Life in Business*, Wash. Post, February 8, 1981, at G2, col. 2.

[127] *Cf.* Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 Harv. L. Rev. 637, 675-76 (1976) (if rules established by power, instead of by procedure as in negotiation, party may not comply with rules).

[128] At least two forces have impeded the dialogue between agencies and interested parties. First, the Federal Advisory Committee Act (FACA), 5 U.S.C. app. §§ 1-15 (1976 & Supp. IV 1980), requires close scrutiny of advisory committees by Congress and the executive branch to determine whether each is carrying out its purpose. *Id.* §§ 5-7. Although FACA recognizes that agencies' advisory committees may be a useful means of furnishing expert advice to agencies, *id.* § 2, uncertainty has arisen about whether the FACA applies to informal ad hoc groups whose views the agency wants to gather on a proposed agency action. Administrative Conference of the United States, Interpretation and Implementation of the Federal Advisory Committee Act, Recommendation 80-3, 1 C.F.R. § 305.80-3 (1981)

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[hereinafter FACA Recommendation]. The Administrative Conference has concluded that such uncertainty about the applicability of the FACA has tended to discourage useful contacts between the agency and the private sector and, accordingly, has recommended that the FACA should not apply to such groups. *Id.* For an excellent review of the inhibiting effects of the FACA, see Memorandum from Brian C. Murphy to Jim J. Tozzi, OMB, Review of Implementation of the Federal Advisory Committee Act (1980) (Dec.12, 1980) [hereinafter Murphy Memorandum] (copy on file at *Georgetown Law Journal*).

The prohibition against ex parte contacts between agencies and interested parties outside the agency during rulemaking or adjudication has also impeded the dialogue. Ex parte rules have been imposed by the APA. *See supra* note 64 and accompanying text (describing provisions of the APA prohibiting ex parte contacts). The courts have applied and refined these ex parte rules. *See* National Small Shipments Traffic Conference, Inc. v. ICC, 590 F.2d 345, 351 (D.C. Cir. 1980) (agency not immune from rule against ex parte contacts when it postpones hearing on merits and prescribes interim substantive rule); United States Lines, Inc. v. Federal Maritime Comm'n, 584 F.2d 519, 539-41 (D.C. Cir. 1978) (secret ex parte contacts are inconsistent with fair hearing and public participation); Home Box Office, Inc. v. FCC, 567 F.2d 9, 53-54 (D.C. Cir.) (if ex parte contacts occur, record must be made and filed so that court may fully exercise its power of review), *cert. denied*, 434 U.S. 829 (1977); *cf.* United Steelworkers of America v. Marshall, 647 F.2d 1189, 1213 (D.C. Cir. 1980) (5 U.S.C. § 557(d) rules which apply to adjudications and formal rulemakings do not bar contacts wholly among agency staff members because Congress, when establishing hybrid process of OSHA, never intended to impose separation of functions requirements), *cert. denied*, 453 U.S. 913 (1981); Hercules, Inc. v. EPA, 598 F.2d 91, 126-27 (D.C. Cir. 1978) (contacts between judicial officer and rulemaking staff not impermissible because need for expedition justified less elaborate procedure); Action for Children's Television v. FCC, 564 F.2d 458, 477 (D.C. Cir. 1977) (informal rulemaking by FCC to improve children's television not susceptible to poisonous ex parte influence because private groups not competing for specific valuable privilege; ex parte communications by industry do not vitiate agency decision).

The uncertain reach of FACA and the restrictions on ex parte meetings during rulemaking have made agencies reluctant to meet with parties interested in a regulation, either singly or as a group, to fill gaps in the record, negotiate positions, or otherwise reach a consensus on a rule. *See* Fox, *supra* note 96, at 97, 104 (many in government believe incorrectly that APA prohibits conversations with interested parties at any stage of regulation development process). Thus, the procedures used to enforce rationality and accountability actually inhibit the ability to gain information and develop consensus. *See* Sierra Club v. Costle, 657 F.2d 298, 352-56 (D.C. Cir. 1981) (Sierra Club claimed that because EPA, when promulgating standard, considered certain evidence after the public comment period ended, interested parties were not informed of new developments in time to make meaningful comments; court held not fatal defect); Cardozo, *The Federal Advisory Committee Act in Operation*, 33 Ad. L. Rev. 1, 26-28 (1981) (discussing examples of President and agencies excluding certain interest groups from meetings because they did not qualify as "advisory committees" under the FACA).

[129] As Professors Jaffe and Stewart stated, *supra* text accompanying notes 87-88, the development of a regulation is a political process. Parties use many political tools to influence the outcome of regulatory decisions; they urge Congress or the White House to pressure agencies, personally pressure agency officials, initiate letter writing campaigns, and the like. Yet, there is no forum in which the competing interests can assemble to strike the political balance directly; rather, each attempts to influence the umpire. *See* Fox, *supra* note 96, at 100 (agencies do not include formal mechanisms for accommodating conflicting interests; one way for government to gain active cooperation of major participants is to establish outside organizations or forums).

[130] *See supra* notes 50-57 and accompanying text (discussing development of administrative record and judicial review).

[131] *See supra* note 95 (address by Senator Roth discussing party's main tool in adversarial process as influencing record).

Dissatisfaction, however, persists with the rules developed under the hybrid process.[132] Business interests complain that agencies do not develop sufficient factual material to support the stringent regulations they issue and do not respond to policy arguments. Beneficiaries of regulation, in contrast, complain that agencies develop far too many facts, attempt to resolve questions that are inherently indeterminable, and do not act with sufficient strength. Agencies themselves complain the entire process is burdensome and consumes far more resources to gather new information, to achieve quality control, or to clarify positions, than it is worth. As a result, many efforts to break away from the basic structure of the APA and to seek new forms of regulatory procedure have been attempted. Some efforts seek to improve the factual bases of rules; others seek to reduce the formality of procedures; still others attempt to find new ways to accommodate competing interests.

### 1. Improvement of Factual Basis of Rules

Proposals suggesting ways to improve the development of facts underlying agency decisions are numerous. Proposals for a "science court" have been around for years.[133] The proponents of the science court argue that although important scientific and technical questions usually cannot be resolved expeditiously enough for regulatory action,[134] the science court would enable development of a consensus concerning the current thinking on relevant scientific and technical questions.[135] This consensus would be achieved through a basically adversarial process, with representatives of competing technical viewpoints acting as the adversaries and a panel of experts acting as the decisionmaker.[136] The agency would then use the "findings" of the "court" as the basis of its regulation.[137]

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[132] It seems supererogatory to marshall a gaggle of citations for this proposition and the elaborations on it that follow. The most cursory review of Plaintiff-Defendant tables or the table of contents of the *Federal Reporter, 2d Series*, reveals the number and variety of challenges to agency action or inaction. Surely that reflects dissatisfaction with the original performance. Even if such evidence can be discounted by the observation that we have become a litigious society and that we rely on courts for many decisions normally entrusted to agencies (which says something in its own right), the literature of the respective interests, including the academics (who rarely engage in the sport of litigation), reflects the unease. Interestingly, the grounds for these qualms may well have reversed since the 1980 election. *See supra* note 26 (discussing criticisms of modern regulatory system).

Undoubtedly the most prominent example of the failure of elaborate procedures to corral agency discretion and to produce acceptable results is the experience under the hybrid rulemaking procedure of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act § 18, added by Pub. L. No. 93-637, § 202(a), 88 Stat. 2183, 2193-98 (1975), 15 U.S.C. § 57a (1976 & Supp. IV 1980). The hybrid rulemaking proceedings under the Act were considered so unsatisfactory that forces mobilized to persuade Congress to impose a legislative veto on the Commission's rulemakings. *See generally* Administrative Conference of the United States, Hybrid Rulemaking Procedures of the Federal Trade Commission, Recommendation No. 80-1, 1 C.F.R. § 305.80-1 (1981) (summarizing criticisms of act's procedural requirements for rulemaking).

[133] *See generally* M. WESSEL, *supra* note 80, at 148; Banks, *The Science Court Proposal in Retrospect: A Literature Review and Case Study*, 10 CRIT. ISSUES IN ENVIR. CON. 95 (1980); Martin, *The Proposed Science Court*, 75 MICH. L. REV. 1058 (1977); Talbott, *"Science Court": A Possible Way to Obtain Scientific Certainty for Decisions Based on Scientific "Fact"*, 8 ENVTL. L. 827 (1978).

[134] *See* Martin, *supra* note 133, at 1063-64 (discussing inability of scientific model to provide final answers quickly enough for regulatory policy decisions).

[135] *See* Talbott, *supra* note 133, at 834-35 (science court would develop consensus in scientific community on scientific issues affecting society).

[136] *See* Martin, *supra* note 133, at 1069-78 (describing adversarial format for science court); Talbott, *supra* note 133, at 831 (same).

Another proposal is to hold broad meetings, open to all responsible scientists, in an effort to develop a consensus on factual questions raised in a regulatory setting.[138] This proposal has already been put into practice to a limited extent. For example, the Consumer Product Safety Act was recently amended to provide a Chronic Hazards Advisory Panel to assess cancer, birth defects, and gene mutations associated with consumer products and to provide reports to the Consumer Product Safety Commission for use in rulemaking proceedings.[139] Similarly, the Environmental Protection Agency is required by statute to submit any "proposed criteria document, standard, limitation, or regulation, together with relevant scientific and technical information . . . on which the proposed action is based" to its Science Advisory Board for comment on its scientific adequacy.[140] Over the years the Food and Drug Administration has empaneled numerous advisory committees to assess the safety and efficacy of drugs. Although the determinations of the panels technically are only advisory, the agency generally has acted on these determinations.[141] These panels consist of well-regarded, neutral experts that are usually academics, and the panel's recommendation represents an assessment of the facts and a policy determination of their relevance.[142]

### 2. Private Party Involvement

Other modifications of the traditional procedures have attempted to involve interested parties at the outset. The Consumer Product Safety Act[143] and the

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[137] Martin, *supra* note 133, at 1088-89.

[138] *See* M. WESSEL, *supra* note 80, at 173 (proposing scientific consensus finding conference).

[139] Consumer Product Safety Amendments of 1981, Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1206(a), 95 Stat. 357, 716-18 (codified at 15 U.S.C.A. § 2077 (West Supp. 1982)). Each panel consists of seven members appointed by the CPSC from a list of nominees submitted by the President of the National Academy of Sciences. *Id.* § 2077(b). Each panel reviews the scientific data or other information relating to the risk of cancer, birth defects, or gene mutations from a consumer product and reports its determination to the Commission. *Id.* (codified at 15 U.S.C. § 2077(a)). The amendments direct the Commission to consider the panel's report and to incorporate the report into the notice of proposed rulemaking. *Id.*

[140] Environmental Research, Development, and Demonstration Authorization Act of 1978 (ERDDA) § 8(e), 42 U.S.C. § 4365(e) (Supp. IV 1980); *cf.* American Petroleum Institute v. Costle, 665 F.2d 1176, 1189 (D.C. Cir. 1981) (although EPA's failure to submit proposed standards to Science Advisory Board violated ERDDA, error not so central as to invalidate final standards). Requiring or authorizing agencies to secure the advice of an advisory committee before issuing a regulation has become a relatively common feature of recent statutes. *See* Occupational Safety and Health Act § 6(b)(1), 29 U.S.C. § 655(b)(1) (1976) (Secretary of Labor may request recommendation of an advisory committee for any rule promulgated by OSHA); National Home Construction and Safety Standards Act of 1974 § 605(b), 42 U.S.C. § 5404(b) (1976 & Supp. IV 1980) (Department of Housing and Urban Development shall consult with advisory council before establishing, amending, or revoking any safety standard). *See generally* SUBCOMM. ON ENERGY, NUCLEAR PROLIFERATION, AND FEDERAL SERVICES OF THE SENATE COMM. ON GOVERNMENTAL AFFAIRS, FEDERAL ADVISORY COMMITTEES, INDEX TO THE MEMBERSHIP OF FEDERAL ADVISORY COMMITTEES LISTED IN THE SIXTH ANNUAL REPORT OF THE PRESIDENT TO THE CONGRESS COVERING CALENDAR YEAR 1977 (1976) (listing existing advisory committees many of which provide advice of the sort described in the text and their membership in regulatory agencies).

[141] *See* Stewart, *supra* note 112, at 1354-1357 (discussing FDA's use of technical advisory committees).

[142] *Id.* at 1354-55.

[143] 15 U.S.C. §§ 2051-2081 (1976 & Supp. IV 1980), *amended by* Consumer Product Safety Amendments of 1981, Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, §§ 1201-1215, 95 Stat. 357, 703-25 (codified at 15 U.S.C.A. §§ 2051-2083 (West Supp. 1982)).

Medical Device Amendments of 1976[144] provide for an "offeror process," which requires the agency to accept offers from groups of citizens who propose rules to the agency.[145] The Fishery Conservation and Management Act of 1976[146] establishes regional fishery management councils consisting of state and federal officials and individuals "knowledgeable or experienced with regard to the management, conservation, or recreational or commercial harvest, of the fishery resources in the geographical area concerned."[147] The Securities Acts Amendments of 1975[148] establish committees of private parties to prescribe rules for various securities transactions.[149]

The National Institute of Building Science (NIBS) is another example of an attempt to involve private parties. NIBS was created as a nongovernmental body consisting of representatives of the various segments of the building industry, including builders, manufacturers of components, labor, code officials, architects, and consumers.[150] Among other things, NIBS develops performance criteria, standards, and other technical provisions suitable for adoption by regulatory agencies.[151] All federal regulatory agencies are encouraged to accept the work product of the NIBS.[152] According to one commentator, "Already [NIBS] has had a constructive impact on the regulatory process in influencing an array of federal regulations that could have led to much higher costs without compensating benefits for the consumer."[153]

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[144] Pub. L. No. 94-295, 90 Stat. 539 (1976) (codified in scattered sections of 21 U.S.C. (1976 & Supp. IV 1980)).

[145] 15 U.S.C. § 2056(b)(4) (1976); 21 U.S.C. § 360(c) (1976). The CPSC's offeror process was eliminated by the Consumer Product Safety Amendments of 1981, Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1202(a), 95 Stat. 703, 703-04 (1981) (codified at 15 U.S.C.A. § 2056 (West Supp. 1982)) (commission shall rely upon voluntary standards and traditional APA rulemaking procedures). For a more detailed description of the offeror process, see *infra* notes 327-48 and accompanying text.

[146] 16 U.S.C. §§ 1801-1882 (1976 & Supp. IV 1980).

[147] *Id.* § 1852(b)(1).

[148] Pub. L. No. 94-29, 89 Stat. 97 (1975) (codified in scattered sections of 15 U.S.C. (1976 & Supp. IV 1980)).

[149] For example, the Securities and Exchange Commission is directed to establish a 15 member Municipal Securities Rulemaking Board, consisting of three groups of individuals:

> (A) five individuals who are not associated with any broker, dealer, or municipal securities dealer, at least one of whom shall be representative of investors in municipal securities, and at least one of whom shall be representative of issuers of municipal securities . . . ; (B) five individuals who are associated with and representative of municipal securities brokers and municipal securities dealers which are not banks . . . ; and (C) five individuals who are associated with and representative of municipal securities dealers which are banks . . . .

*Id.* § 13(b)(1) (codified at 15 U.S.C. § 78o-4(b)(1) (1976)). The Act directs the board to propose and adopt rules "with respect to transactions in municipal securities effected by brokers, dealers, and municipal securities dealers." *Id.* § 13(b)(2) (codified at 15 U.S.C. § 78o-4(b)(2) (1976)). The ultimate authority of the regulation of municipal securities remains with the Commission, however. *Id.* § 13(b)(3) (codified at 15 U.S.C. § 78o-4(b)(3) (1976)). Although it makes independent decisions, the Board consults with the Commissioners on particularly controversial matters. It takes the SEC's comments into account, sometimes backing off a proposal, and sometimes not. Interview with Dean Richard West, Amos Tuck School of Business Administration, Dartmouth College, Chairman of the Board (Jan. 21, 1981) (copy on file at *Georgetown Law Journal*).

[150] Housing and Community Development Act of 1974 § 809(a)-(b), 12 U.S.C. § 1701j-2(a)-(b) (1976 & Supp. IV 1980).

[151] *Id.* § 1701j-2(e)(1)(A).

[152] *Id.* § 1701j-2(g)(1).

[153] Fox, *supra* note 96, at 100.

### 3. Search for Alternatives

These innovative proposals could be viewed merely as an experimentation with new forms of regulatory procedure. The proliferation of such innovations combined with many new regulatory statutes that contain their own procedural sections, however, evinces a belief that the rulemaking approach of the APA as augmented by hybrid rulemaking is inadequate. These proposals also reflect a lack of confidence in the belief that hybrid rulemaking is the answer to all regulatory questions. In short, they recognize that procedures derived from adjudication are an inappropriate device for making fundamentally political, legislative choices. These proposals also reject the argument that too many restrictions already fetter agencies; they reflect a continuation of the distrust of broad discretion that led to hybrid rulemaking in the first instance.[154]

The new procedures have two interrelated threads. One thread is the search for a method to force agencies to develop reasonable analytical bases on which enlightened decisions can be made. The other thread is the attempt to provide a method that enables the affected interests to participate in developing a rule by sharing in the decision,[155] as opposed to adversarial participation with parties making formal arguments that may or may not be accepted by the agency. The interrelationship of these two threads stems from the belief that agencies are insensitive to the policy implications of the overall factual setting of a proposed rule. The first response is the use of analysis to force consideration of the issues that would be raised and considered if those affected by a rule could participate directly.[156] The theory underlying this response is that requiring analysis sensitizes agencies to the difficult decisions to be made by explicitly identifying the policy choice rather than commingling it with factual determinations. The second response is an attempt to replicate at least part of the political process through advisory committees that tap a diversity of interests and that provide advice and guidance to the agency. Requiring analysis to force consideration of the issues and the use of advisory committees are attempts to instill public confidence in the regulatory decisions.

The classic way of establishing public confidence, however, is to have representatives of the people make the policy choices. Thus, an alternative, more direct way to make the inherently political decisions would be to adapt the legislative process itself to the development of regulations. Such a process would enable representatives of the competing interests, including the relevant agency itself, to thrash out a consensus on the policy instead of making a pitch to the umpire. A form of negotiation among the parties affected by a proposed rule would be such a process.

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[154] Before giving free rein to agencies will be politically acceptable, we must have a reason to have faith that agencies will reach an acceptable result and a measure of determining whether they do so. We lack both.

[155] As in most democratic situations, individuals would not participate directly at the table: rather their representatives would. Just as Congress is organized by geographical representation, negotiations of this sort could be organized by interest.

[156] Examples of this phenomenon are Environmental Impact Statements required by the National Environmental Policy Act § 102, 42 U.S.C. § 4332 (1976); cost-benefit or cost-effectiveness studies required by Executive Order 12,291, *supra* note 66; requirements that before issuing a rule agencies consult with scientists that can help put a problem into perspective, *supra* note 140; and proposals that would require agencies to conduct an assessment of the risk posed by the subject of the proposed regulation before proceeding, *see, e.g.*, H.R. 3441, 97th Cong., 1st Sess., 127 CONG. REC. H1860 (daily ed. May 5, 1981) (proposing to establish program under direction of Office of Science and Technology Policy to improve and facilitate risk analysis of scientific and technological decisions).

## III. THE ADVANTAGES OF RULEMAKING BY NEGOTIATION

The idea of developing rules through negotiation among interested parties received brief attention when John Dunlop proposed it during his tenure as Secretary of Labor.[157] Interest in the idea largely died before being translated into legal requirements or practice. Recently, however, a number of studies and articles have renewed the interest in using a form of negotiation to establish rules.[158]

Negotiating has many advantages over the adversarial process. The parties participate directly and immediately in the decision. They share in its development and concur with it, rather than "participate" by submitting information that the decisionmaker considers in reaching the decision. Frequently, those who participate in the negotiation are closer to the ultimate decisionmaking authority of the interest they represent than traditional intermediaries that represent the interest in an adversarial proceeding. Thus, participants in negotiations can make substantive decisions, rather than acting as experts in the decisionmaking process. In addition, negotiation can be a less expensive means of decisionmaking because it reduces the need to engage in defensive research in anticipation of arguments made by adversaries.

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[157] Dunlop explained:

> [T]he rule-making and adjudicatory procedures do not include a mechanism for the development of mutual accommodation among the conflicting interests. Opposing interests argue their case to the government, and not to each other. Direct discussions and negotiations among opposing points of view, where mutual accommodation is mutually desirable—as in collective bargaining—forces the parties to set priorities among their demands, trading off one for another, which creates an incentive for them to find common ground. The values, perceptions, and needs for each become apparent, and some measure of mutual understanding is a by-product.

Dunlop, *supra* note 109, at 886.

[158] *See, e.g.,* Fox, *supra* note 96, at 97 (discussing examples of regulatory agency mechanisms to accommodate interests); Reich, *supra* note 96, at 82 (suggesting methods for moderating dangerous influence of professional intermediaries, including informal negotiations); Schuck, *supra* note 97, at 26 (suggesting regulatory system overemphasizes adjudicatory decisionmaking; role of bargaining should be expanded); Stewart, *supra* note 112, at 1256 (suggesting that promotion of decisionmaking procedures other than adversary litigation would improve productivity and achievement of environmental, health, and safety goals simultaneously); Note, *supra* note 96, at 1871-80 (describing proposals and arguments, pro and con, regarding regulatory negotiation); Remarks of Vice President George Bush, 23d Plenary Session of the Administrative Conference of the United States (Dec. 10, 1981) (advocating "equivalent of consent decrees" before the beginning of formal regulatory process) (copy on file at *Georgetown Law Journal*); *Hearing on H.R. 746, Regulatory Procedure Act of 1981, Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 683-84 (1982) (testimony of C. Boyden Gray, Counsel to the Vice President of the United States, advocating closer relations between agencies and regulated industries, including meetings between affected parties and agencies prior to formal rulemaking process); Remarks of Senator William Roth, 23d Plenary Session of the Administrative Conference of the United States (Dec. 11, 1981) (discussing experimental alternatives to the traditional rulemaking process).

Congressional proposals would provide a structure for negotiating regulations. S. 1601, 97th Cong., 1st Sess., 127 CONG. REC. 123, S9328 (daily ed. Sept. 9, 1981); S. 1360, 97th Cong., 1st Sess., 127 CONG. REC. 88, S6119 (daily ed. June 11, 1981); H.R. 1336, 97th Cong., 1st Sess., 127 CONG. REC. 14, 214 (daily ed. Jan. 27, 1981); *see* Bingham, *Does Negotiation Hold a Promise for Regulatory Reform*, RESOLVE, Fall 1981, 1, 2-6 (Conservation Foundation publication comparing the proposed congressional bills on regulatory negotiation).

Undoubtedly the prime benefit of direct negotiations is that it enables the participants to focus squarely on their respective interests. They need not advocate and maintain extreme positions before a decisionmaker. Therefore, the parties can develop a feel for the true issues that lie within the advocated extremes and attempt to accommodate fully the competing interests.[159] An example of this benefit occurred when a group of environmentalists opposed the construction of a dam because they feared it would lead to the development of a nearby valley.[160] The proponents of the dam were farmers in the valley who were adversely affected by periodic floods. Negotiations between the two groups, which were begun at the behest of the governor, revealed a common interest in preserving the valley.[161] Without the negotiations the environmentalists would have undoubtedly sued to block construction, and necessarily would have employed adversarial tactics. Negotiations, however, demonstrated the true interests of the parties and permitted them to work toward accommodation.

In another example, an environmental group sued a government agency that granted a permit for a uranium mine, alleging that the environmental impact statement (EIS) was defective. The mine, confronted with protracted litigation and the consequent delay, agreed to negotiations. The attorney for the environmental group queried rhetorically what would have happened if the case had been successful?[162] He thought that the mining company would simply beef up the EIS and continue to build the mine.[163] Negotiations enabled the parties to focus on the issues separating them instead of fighting the legal strawman of a defective EIS. A general agreement resulted from the negotiations.[164] More important, both sides were enthusiastic about the process.[165]

Negotiation enables the parties to rank their concerns and to make trades to maximize their respective interests. In a traditional proceeding an agency may be unable to anticipate the intensity with which the respective parties may view the various provisions of a proposed rule. The agency may focus on an aspect of a rule that is critical to one party, but not of particular interest to other parties.[166] An agency simply would have to guess how to reconcile such an issue because it would not know how to rank the parties' concerns. An interested party, however, could easily decide to accommodate another party in return for concession on a critical point. An example of such a trade off process would be when a beneficiary of a proposed regulation argues that the standard should be stringent with early compliance by the regulated company. A company that must comply with the regulation might counter that the standard should be more lenient with a long lead time for compliance. An agency faced with this situation might decide to require a lax standard in response to the company's claims of excessive burdens and require a short deadline in response to the need for immediate protection. Everyone involved, however, may be more content with precisely the opposite result. A rule allowing a longer time to implement a more stringent standard might benefit both parties because the shorter time for implementation might cause disruption that would offset any savings resulting from the reduced level of regulation.

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[159] Schuck, *supra* note 97, at 26 (discussing propensity of participants in present rulemaking process to address concerns of decisionmaker rather than own interests).

[160] Sviridoff, *Recent Trends in Resolving Interpersonal, Community and Environmental Disputes*, ARB. J., Sept. 1980, at 3, 8 (negotiations, including mediation, began in 1974 after Army Corps of Engineers proposed dam on Snoqualmie River near Seattle, Washington).

[161] *Id.*

[162] Interview with Luke Danielson, counsel for National Wildlife Federation (Sept. 22, 1981) (concerning Homestake Mining Company's pitch mine) (copy on file at *Georgetown Law Journal*) [hereinafter Danielson Interview].

[163] *Id.*

[164] In return for a covenant not to sue from the conservationists, Homestake agreed to make results of research relating to water quality available to the public; to conduct a thorough and comprehensive program of research in revegetation; to add two members nominated by conservationists to its citizen's advisory committee; to implement a program to compensate for range loss and habitat disturbance to wildlife, in the event that such results are demonstrated; and to use its best efforts to ensure an adequate water flow in a neighboring creek. Mediation Agreement (Apr. 10, 1981) (agreement between Homestake Mining Company and eight conservation organizations) (copy on file at *Georgetown Law Journal*).

[165] The press release accompanying the agreement stated: "Frustration with the time wasted and costs incurred through confrontation led both sides to try head-to-head negotiation to resolve their differences." Homestake Mining Company and Coalition of Colorado Environmentalists, Joint Press Release (Apr. 15, 1981). Lawyers for both parties indicated that they thought negotiation was preferable to litigation as a method of resolving the dispute. Danielson Interview, *supra* note 162; Interview with John Watson, Counsel for Homestake Mining Company (Sept. 22, 1981) (copy on file at *Georgetown Law Journal*) [hereinafter Watson Interview].

Rulemaking by negotiation can reduce the time and cost of developing regulations by emphasizing practical and empirical concerns rather than theoretical predictions. In developing a regulation under the current system, an agency must prove a factual case, at least preliminarily, and anticipate the factual information that will be submitted in the record. Because the agency lacks direct access to empirical data, the information used is often of a theoretical nature derived from models. In negotiations, the parties in interest decide together what information is necessary to make a reasonably informed decision. Therefore, the data used in negotiations may not have to be as theoretical or as extensive as it is in an adversary process.[167] For example, one agency proposed a regulation based on highly technical, theoretical data. The parties argued that the theoretical data was unnecessary because it simply did not reflect the practical experiences of the parties and of another agency.[168] The agency determined the validity of the assertion and modified its regulation accordingly.[169] The lesson of this example is that the data can emphasize practical and empirical concerns rather than theoretical predictions. In turn, this emphasis on practical experience can reduce the time and cost of developing regulations by reducing the need for developing extensive theoretical data.

Negotiation also can enable the participants to focus on the details of a regulation. In the adversary process, the big points must be hit and hit hard, while the subtleties and details frequently are overlooked.[170] Or, even if the details are not overlooked, the decisionmaker may not appreciate their consequences.[171] In negotiations, however, interested parties can directly address all aspects of a problem in attempting to formulate workable solutions.

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[166] *See supra* notes 104-12 and accompanying text (discussing tendency of adversarial parties to take extreme, undifferentiated positions).

[167] Interview with Dr. Gerald W. Cormick, Executive Director, The Institute for Environmental Mediation (April 27, 1981) (data and theory need not be developed as completely in negotiation as in adversarial process) (copy on file at *Georgetown Law Journal*) [hereinafter Cormick Interview].

[168] Interview with Thomas H. Seymour, Acting Director, Office of Safety Standards, Occupational Safety and Health Administration, U.S. Dep't of Labor (July 6, 1981) (Corps of Engineers' standard for shoring deep trenches did not predict actual physical occurrences in shallow trenches) (copy on file at *Georgetown Law Journal*) [hereinafter Seymour Interview].

[169] *Id.*

[170] Because the parties are forced to advocate extreme positions on virtually every issue, they usually find it difficult to develop either the details of their position or of positions within the poles of debate.

Overarching all the other benefits of negotiations is the added legitimacy a rule would acquire if all parties viewed the rule as reasonable and endorsed it without a fight.[172] Affected parties would participate in the development of a rule by sharing in the decisions, ranking their own concerns and needs, and trading them with other parties. Regardless of whether the horse under design turns out to be a five-legged camel or a Kentucky Derby winner, the resulting rule would have a validity beyond those developed under the current procedures. Moreover, nothing indicates that the results would be of any lesser quality than those developed currently. Surely the *Code of Federal Regulations* stable has as many camels as derby winners.[173]

Negotiation clearly has distinct advantages. It is therefore easy to fall into a "hot tub" view of negotiation as a method of settling disputes and establishing public policy: if only we strip off the armor of an adversarial hearing, everyone will jump into negotiations with beguiling honesty and openness to reach the optimum solution to the problem at hand. In fact, the process is far more complex than that. Negotiation must be carefully analyzed to determine not only whether it can work at all in the regulatory context, but also to identify those situations in which it is appropriate. Moreover, if a form of negotiation is to be used to develop rules issued by a government agency that determine the rights and obligations of the population at large, the process must be sensitive to methods of conducting negotiations and translating any result into a binding rule. Thus, the complex legal issues of how negotiations would relate to the APA and to the traditional political theories and values underlying rulemaking procedures must be examined.

## IV. NEGOTIATING POLICY DECISIONS: ANALOGUES OF REGULATORY NEGOTIATION

Negotiating decisions to resolve important public questions is certainly not radical, nor is it particularly unusual. Although very few current federal regu-

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As a result, important aspects of the issues that may determine whether a regulation works well may go without comment. Thus, the decisionmaker must decide issues without suitable guidance. The Occupational Safety and Health Act (OSHA) is a prominent example of this phenomenon on the legislative front. The parties were so preoccupied with fighting over whether to have any regulatory program and the structure and location of such a program that they virtually ignored the "detail" of what factors the agency should or must consider when issuing standards. Harter, *In Search of OSHA*, REGULATION, Sept.-Oct. 1977, at 33, 33-34 (discussing how legislative debate on OSHA focused on structural questions and failed to establish a policy for standard setting); *see* American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 512-13 (1981) (interpreting OSHA to require standards that adequately ensure that no employee will suffer material impairment of health; limited only by feasibility of standards).

[171] Shuck, *supra* note 97, at 28 (litigation approach leaves decisionmaker remote from ambiguities and subtleties of problem).

[172] As John Dunlop stated: "In our society, a rule that is developed with the involvement of the parties who are affected is more likely to be accepted and to be effective in accomplishing its intended purposes." Dunlop, *supra* note 109, at 887.

[173] For a particularly vivid anatomical description of one such camel, see Ackerman & Hassler, *supra* note 7, at 1466, which discusses the problematic regulations implementing the Clean Air Act Amendments of 1977, 42 U.S.C. §§ 7401-7648 (Supp. IV 1980).

lations have been developed by negotiations, negotiations are used in many analogous situations. The experience of these analogous situations shows that, in appropriate circumstances, the use of negotiation to establish policy lives up to its promise.

### A. CURRENT REGULATORY NEGOTIATION

A form of negotiation occurs in virtually every rulemaking of consequence. During the developmental stage of a rule, many of the major interest groups meet with agency representatives to express their views on the proposed rule.[174] Although these meetings are clearly a form of negotiation between an interested party and the agency, the negotiation is virtually always sequential. One party talks to the agency and then another and then another and so on. This is *not* the form of negotiation considered by this article. Rather, such negotiation envisions the interested parties sitting down together and addressing the issues together. Very few regulations have been developed by this process.[175]

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[174] *See, e.g.,* W. MAGAT, L. GIANESSI, & W. HARRINGTON, ENVIRONMENTAL REGULATION IN THEORY AND PRACTICE: EPA'S PROCESS OF SETTING BEST PRACTICABLE CONTROL TECHNOLOGY STANDARDS 2-14, 2-17 (1978) (study of Environmental Protection Agency's process of setting standards and its application of process to rulemaking for setting water quality standards) [hereinafter W. MAGAT, L. GIANESSI & W. HARRINGTON].

[175] Professor Jaffe discusses the development of the Federal Communication Commission's (FCC) regulation of cable TV and the Federal Power Commission's setting producer prices of natural gas. Jaffe, *supra* note 2, at 1194 & n.61. Apparently, the FCC issued a letter of intent incorporating the policies it would follow with respect to cable television. The FCC explained that the policies resulted from an intensive study of the issues and a balance of the equities involved. The three major groups affected by the contemplated rules, broadcasters, cable operators and copywriters, entered into an agreement proposing three modifications to the regulations envisioned. The Commission adopted the changes. *Id.* at 1194. *See* Geller v. FCC, 610 F.2d 973, 979-80 (D.C. Cir. 1979) (agency properly adopted modifications only if agency shows modified regulations serve public interest).

Professor Stewart provides another example involving the FCC. Competing telephone service companies negotiated regulatory standards in a tariff agreement. Stewart, *supra* note 112, at 1351 n.284. Because the parties wished to reduce uncertainty and delay, the negotiations succeeded. OSHA also has negotiated at least two standards. One involved telecommunications, 29 C.F.R. § 1910.268 (1981) (standard applying to working conditions at telecommunication centers and field installations). Negotiation participants included American Telephone & Telegraph Corporation, the International Brotherhood of Electrical Workers, and the Communication Workers of America. OSHA monitored the process, but did not participate as a full member. Seymour Interview, *supra* note 168. OSHA negotiated a second standard involving electrical systems in hazardous locations. The negotiations were conducted under the auspices of the revision of the National Electric Code. *See infra* notes 592-593 and accompanying text (discussing Code's allowing nonmetallic sheathed cable in some locations, but requiring more expensive, safer wiring in places of public accommodation).

The Environmental Protection Agency (EPA) recently negotiated an agreement with the Chemical Manufacturer's Association for the testing of particular chemicals that would be conducted by the companies in lieu of a mandatory agency testing. 47 Fed. Reg. 335, 335 (Jan. 5, 1982) (follow-up response to Interagency Testing Committee on particular chemicals). In response to a protest filed by the Natural Resources Defense Council, EPA said it believed the agreement comported with its overall statutory responsibilities, and that it had afforded the public an opportunity to comment on the decision. *Id.* Importantly, the agency stated that it believed that the testing would be completed more expeditiously under the agreement than if the agency itself were to do it. *Id.* at 336. The companies agreed to waive all claims of confidentiality, and the agency planned to monitor developments carefully. *Id.*

Several years ago attempts were made to negotiate the automobile mileage requirements. R. GOODSON, FEDERAL REGULATION OF MOTOR VEHICLES: A SUMMARY AND ANALYSIS 12 n.10 (Mar. 1977) (Department of Transportation report, DOT-TS-11552) (discussing conflict over emissions standards in 1960's). The process fell apart when EPA refused to relax the emission standards called for in the agreement. *Id.* at 35.

There are also examples in which agencies negotiated a proposed rule with only one or a limited

Sequential negotiation is substantively different from the negotiation process outlined above because such negotiation is merely one form of the adversary process itself: each party attempts to sway the decisionmaker to a favorable disposition. Indeed, the very purpose of the sequential discussions is to persuade the decisionmaker to be sympathetic with the group's views. The competing parties themselves do not meet together to work out an accommodation. Moreover, the agency clearly remains sovereign and takes the position that it is the decisionmaker.[176] The interest groups negotiate as supplicants, not as sharers of the ultimate decision.[177] Such a process may be negotiation, but it is not consensus.

Genuine negotiation could be implemented under current law. Agencies could empanel representatives of the interests who have a stake in a rule and have them negotiate a proposed rule among themselves; the agency would then use the negotiated rule as the basis for a notice of proposed rulemaking.[178] Agencies are understandably hesitant to do so, however. First, they would have to qualify the group as an advisory committee under the Federal Advisory Committee Act (FACA),[179] which imposes various requirements not fully conducive to negotiations.[180] Second, the full reach and applicability of judi-

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number of parties in interest. This, of course, is not the group consensus envisioned in regulatory negotiations. *See* Center for Auto Safety v. Cox, 580 F.2d 689, 690-91 (D.C. Cir. 1978) (Federal Highway Administration promulgated highway construction standards after meeting with state transportation agency, but not with parties with conflicting interests); Moss v. Civil Aeronautics Bd., 430 F.2d 891, 893 (D.C. Cir. 1970) (court disallowed fare increases because public improperly fenced out of ratemaking process).

Undoubtedly, there are other examples in which regulations were negotiated in the first instance by the parties in interest and the notice of proposed rulemaking reflects a resulting consensus. Inquiries of many careful observers of the regulatory process, both inside the government and out, however, did not turn up many additional examples. One must conclude that very few regulations are developed under a negotiation process as discussed in this article.

[176] Eisenberg points out the difference between discussion and negotiation. Eisenberg, *supra* note 127, at 674-75. Negotiation indicates an effort to reach an agreement and connotes that both parties have a rightful interest in the matter at hand. *Id.* Discussion, on the other hand, concedes that one of the parties has the power to impose the decision. *Id.*

[177] *See infra* notes 515-46 and accompanying text (discussing various approaches to defining consensus).

[178] Agencies do make extensive use of voluntary standards that reflect the consensus among the interests involved. *See* P. HARTER, REGULATORY USE OF STANDARDS: THE IMPLICATIONS FOR STANDARDS WRITERS 12-17 (Nov. 1979) (National Bureau of Standards report discussing use of industrial standards in agency regulation). In such a case, the agency reviews, and possibly modifies, a standard developed independently of the regulatory process even though everyone involved in drafting the standard knew it ultimately would become a regulation. *Id.* at 6. This regulatory use of standards is closely analogous to negotiation of regulations. *See infra* notes 184-93 and accompanying text (discussing numerous agency standards originating as voluntary consensus standards).

[179] 5 U.S.C. app. §§ 1-15 (1976 & Supp. IV 1980); *see* Center for Auto Safety v. Cox, 580 F.2d 689, 694 (D.C. Cir. 1978) (group became advisory committee within meaning of FACA when federal administrator disclosed proposed regulations to and obtained advice from select group); FACA Recommendation, *supra* note 128 (suggesting implementation be relaxed in certain circumstances).

[180] For example, before an advisory committee can be convened, a charter must be approved by the head of the agency involved and the Director of Office of Management and Budget. 5 U.S.C. app. § 9 (1976 & Supp. IV 1980). Apparently, agencies have found the chartering process time-consuming and cumbersome. *See* FACA Recommendation, *supra* note 128 (discussing failure of many de facto committees to be officially chartered). Notice of meetings of advisory committees must be published in the *Federal Register* and meetings must be open to the public unless good cause is shown to hold the meeting in private. *Id.* § 10(a)(1). FACA further provides that an officer of the federal government has the authority to adjourn each meeting and to prohibit the committee from conducting business in the absence of that officer. *Id.* § 10(e). Thus, it clearly gives supremacy to an officer of the federal govern-

cially imposed ex parte rules is unclear.[181] An agency may fear that a court would find it inappropriate to permit the parties to participate in a negotiated rulemaking when the avowed purpose of the negotiation is to develop a proposed rule for the agency. Several judicial decisions are sometimes read as casting doubt on the legality of all ex parte communications.[182] Those decisions, however, probably can be limited to their facts because in each case the agency was importuned by and struck agreements with only a few parties; the agency did not develop a consensus among the range of affected interests.[183] Thus, properly constituted committees and ex parte rules should not be insurmountable obstacles to the institution of negotiations in the rulemaking process.

### B. CONSENSUS STANDARDS

Probably the closest analogue to negotiated rules lies in the vast array of

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ment. FACA also emphasizes that an advisory committee is just that. Therefore, determination of action to be taken and policy to be expressed rests solely with the government. *Id.* § 9(b).

Taken together, these restrictions inhibit the use of FACA for convening the regulatory negotiation committee. Compliance with the FACA can be time-consuming, and the requirement for public meetings can be inhibiting. *See infra* text accompanying notes 452-54 (discussing advantages and disadvantages of public meetings). The public meeting requirement places a distance between the committee and the government. That is not to say, however, that FACA's requirements are insurmountable. They clearly are not and, indeed, if sympathetically administered, FACA would not be a major inhibition to convening a regulatory negotiation group.

[181] *See* Murphy Memorandum, *supra* note 128 (discussing impact of court decisions on ex parte contacts on advisory committees composed of government officials).

[182] Two cases in particular exhibit this problem. In Home Box Office v. FCC, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977), the court condemned ex parte contacts with industry. *Id.* at 55-57. In that case, the agency restricted the forum for adversarial comment, and the secrecy impeded judicial review of the agency's decision. *Id.* at 55-56. Moreover, undue influence threatened fundamental fairness. *Id.* at 56-57. In Moss v. CAB, 430 F.2d 891 (D.C. Cir. 1970), the court disallowed fare increases approved by the Civil Aeronautics Board because the agency held ex parte meetings with industry and conducted only pro forma hearings which improperly fenced the public out of the ratemaking process. *Id.* at 893. *See also* Stewart, *supra* note 112, at 1345-46 (discussing questionable nature of undisclosed, off-the-record communications between interested outside parties once formal comment period has begun).

[183] *Home Box Office*, 567 F.2d at 51-52; *Moss*, 430 F.2d at 893. As Stewart observes, however, such cases do cast doubt on the legality of off-the-record communications between interested outside parties and it is by no means clear that the inclusion of a broader range of interests would remove such a doubt. Stewart, *supra* note 112, at 1345-46. This doubt is the major inhibition on agency use of a negotiation process.

During the debate on the proposed recommendation before the ACUS, Professor Davis pointed out that ex parte contacts are not proscribed before a rulemaking proceeding begins. Remarks of Professor Kenneth C. Davis, 23d Plenary Session of the Administrative Conference of the United States (June 18, 1982). Other members of the Conference argued that because agencies are insecure about when the prohibitions begin, they are reluctant to engage in such contacts once the agency has begun to work on a specific rule, even if no notice of proposed rulemaking has been published. Remarks of Chairman Olpin, 23d Plenary Session of the Administrative Conference of the United States (June 18, 1982). Uncertainty about whether a court would interpret the empaneling of a committee for negotiation of a rule as the beginning of the rulemaking process, thus precipitating application of the restrictions, heightens such insecurity. Because of the inhibitions placed on the use of negotiation to develop proposed rules by the FACA prohibitions on ex parte contacts, ACUS formally recommended that "Congress should facilitate the regulatory negotiation process by passing legislation authorizing agencies to conduct rulemaking in the manner described in this recommendation." Recommendation 2, Administrative Conference of the United States, Recommendation 82-4, 47 Fed. Reg. 30,701- 30,709 (1982). In particular, it recommended freeing agencies of the restrictions of FACA and ex parte limitations and providing that information tendered during the process is not subject to the Freedom of Information Act. *Id.*

standards developed through a consensus process.[184] The subjects of these standards, of which there are tens of thousands, range in complexity from the mundane, such as threads for fitting light bulbs to lamps, to the esoteric, such as control technologies for nuclear plants or storage facilities for liquified natural gas. Many consensus standards have been the basis of mandatory regulatory requirements.[185] For example, the National Electric Code,[186] which is claimed to be the most widely adopted model code in the world, is developed through the consensus process.[187]

Consensus standards are developed through a structured decisionmaking process among representatives of interests materially affected by the standard.[188] The parties frequently confront difficult value choices, such as trade offs between cost and safety.[189] Development of standards is, therefore, a form of regulatory negotiation,[190] and their very existence demonstrates that complex, value-laden rules can be negotiated.[191] Indeed, virtually every person in the United States daily entrusts his life to such negotiated rules, in the form of electrical and building codes, product safety standards, and workplace safety and health standards.[192] Standards developed through a consensus process are available, however, only in situations in which a standards-writing organization can address adequately the issues raised by a proposed rule.[193] This article is addressed largely to those situations in which such a resolution is not possible.

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[184] *See generally* Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 TEX. L. REV. 1329 (1978) (federal agencies can utilize experience and expertise used to develop private consensus standards and ensure the protection of interests of consumers, workers and small businesses); P. HARTER, *supra* note 178, at v (discussing how private standards writers can better anticipate government use of their standards).

[185] P. HARTER, *supra* note 178, at 2 (many government standards based on standards developed by private organizations).

[186] NATIONAL ELECTRIC CODE (National Fire Protection Ass'n 1975).

[187] Summers, *Preface* to THE NATIONAL ELECTRIC CODE HANDBOOK, at ix, xi (W. Summers ed. 1978).

[188] *See infra* text accompanying notes 521-22 (describing consensus process that usually requires approval of more than a bare majority and provides reconsideration through appeal mechanism).

[189] *See infra* text accompanying notes 588-93 (discussing how consensus process helps resolve difficult trade offs).

[190] For a discussion of the ways in which consensus standards are used in regulations, see Administrative Conference of the United States, Recommendation 78-4, 1 C.F.R. § 305.78-4 (1981) (urging agencies with authority to issue health and safety regulations to interact with private standard writing organizations); P. HARTER, *supra* note 178, at 12-17 (discussing use of standards in agency regulation); Hamilton, *supra* note 184 (federal agencies can utilize the experience and expertise of private consensus standards and ensure protection of interests of consumers, workers, and small businesses).

[191] Professor Stewart argues that the areas in which consensus standards have been developed are those in which firms already have a "substantial incentive to adopt and adhere to voluntary standards," and that incentives to develop such standards may be lacking in other regulatory areas, such as environmental control. Stewart, *supra* note 112, at 1343. Although Professor Stewart's analysis may not take adequate account of the diversity of interests involved in developing many consensus standards, such diversity often means that no single, unifying incentive brings the parties together to write a standard. Nevertheless, Professor Stewart raises the criticial point that parties need an incentive to negotiate a standard or rule. If negotiation of regulations is to work, the single most important question is whether the parties in interest will get together to negotiate a consensus position.

[192] *See* MacAvoy, *Preface* to OSHA REGULATIONS (P. MacAvoy ed. 1977) (analyzing task force results on revising OSHA regulations); P. HARTER, *supra* note 178, at 13 n.11, 14 n.13 (same). Hamilton, *supra* note 184, at 1386-1436 (discussing standards of various government agencies).

[193] *See* J. Young, Technological Innovation and Health, Safety and Environmental Regulation, ch. 8, 24-30 (1982) (unpublished manuscript for Office of Technology Assessment contrasting voluntary standards and negotiated regulations).

### C. SETTLEMENTS

Negotiations of the sort under examination here play a vitally important role in the regulatory process in the form of the settlement of lawsuits challenging rules promulgated by an agency. Interestingly, the settlement of litigation challenging rules has generated little attention in either the literature[194] or regulatory theory.[195] It is a relatively common occurrence, however, for parties that have challenged a regulation to negotiate an acceptable agreement.[196] In return for withdrawing the petition challenging the rule, the agency frequently

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[194] *See* Cohen, *Settling Litigation: A New Role for Regulatory Lawyers*, 67 A.B.A. J. 878, 878 (1981) (negotiations between industry and government can lead to improvement of regulations when industry shows sense of restraint). Negotiated settlement of rate cases, however, has been analyzed. Morgan, *supra* note 24, at 21 (discussing reduction of administrative delay through various methods, including increased use of informal rulemaking); Spritzer, *Uses of the Summary Power to Suspend Rates: An Examination of Federal Regulatory Agency Practices*, 120 U. Pa. L. Rev. 39, 39 (1971) (discussing how use of summary power to suspend proposed tariff change can induce company to negotiate for modified proposal); Administrative Conference of the United States, Recommendation 78-1, 1 C.F.R. § 305.78-1 (1981) (advocating participation of agencies charged with ratemaking responsibility in negotiated settlements, if agency also takes account of public interest); Administrative Conference of the United States, Recommendation 72-4, 1 C.F.R. § 305.72-4 (1981) (discussing suspension and negotiation of rate proceedings by federal regulatory agency).

[195] The settlement of agency adjudication has been both analyzed and specifically provided for in the APA. 5 U.S.C. § 554(c) (1976). The Senate Judiciary Committee claimed in the legislative history of the APA that "even courts through pre-trial proceedings dispose with much of their business [by informal settlement]. There is much more reason to do so in the administrative process, for informal procedures constitute the vast bulk of administrative adjudication and are truly the lifeblood of the administrative process . . . ." Legislative History, *supra* note 12, at 24; *see* Zimmer & Sullivan, *Consent Decree Settlements by Administrative Agencies in Antitrust and Employment Discrimination: Optimizing Public and Private Interests*, 76 Duke L.J. 163, 163 (1976) (interests of public or parties not privy to Government's case may not receive adequate consideration in formulation of consent decrees); Comment, *Public Participation in Federal Administrative Proceedings*, 120 U. Pa. L. Rev. 702, 704 (1972) (study of the legal mechanisms by which groups seeking to represent or promote public interest permitted to participate in certain proceedings); MacIntyre & Volhard, *Intervention in Agency Adjudications*, 58 Va. L. Rev. 230, 232 (1972) (describing how public standing to intervene in administrative proceedings can pose serious threat to intra-agency allocation of resources).

[196] For example, the EPA is reportedly negotiating a settlement for the automobile industry concerning its emission standards and mileage testing procedures. The negotiations are an attempt to settle eight lawsuits filed by the auto industry. Wash. Post, Nov. 27, 1981, at A1, col. 3. The Department of Labor is reportedly attempting to settle litigation over its standard for occupational exposure to arsenic. Legal Times of Wash., July 27, 1981, at 1, col. 1. Negotiations concerning regulations of the Department of Interior involving strip mining have been conducted. Wash. Post, Apr. 3, 1981, at A6, col. 4. EPA's regulations requiring pretreatment of effluents by industrial plants have been the subject of negotiation. Legal Times of Wash., July 2, 1979, at 1, col. 4. The 30 phase one effluent guidelines issued by the EPA under the Federal Water Pollution Control Amendments of 1972 were subjected to judicial review, and nine of the suits were settled. W. Magat, L. Gianessi & W. Harrington, *supra* note 174, at 2-46. Further, a number of other guidelines apparently were modified in response to meetings between industry and the EPA prior to the industry's filing suit. *Id.* at 2-49, 2-50.

EPA's implementation of the Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1976 & Supp. IV 1980), is an example of a particularly elaborate settlement. In Environmental Defense Fund v. Costle , 636 F.2d 1229 (D.C. Cir. 1980), the EPA, in settling challenges by various environmental groups, agreed to a comprehensive strategy for implementation of the Act. *Id.* at 1235. After the agreement was submitted to the district court for approval, the district court held hearings and allowed interested parties to file comments on the agreement. Corporate interests intervened in the proceedings and filed comments vigorously opposing the proposed agreement. After requiring several modifications, the district court found it a just, fair, and equitable resolution of the issues raised. *Id.* at 1235. The EPA, the environmental groups, and the National Coal Association signed the agreement. Because the environmental groups believed that the EPA was not living up to the terms of the agreement and industry representatives were disgruntled, they filed a suit against EPA. *Id.* at 1235-36. Interestingly, the court remanded the case for determination of whether it was appropriate for the agency to enter into an agreement that might infringe the discretion Congress committed to the administrator. *Id.* at 1259. During the remand, the EPA asked the district court to modify the agreement on grounds of the EPA's agrees to publish a change in the regulation as a proposed rule.[197] Because the main parties in interest negotiated the change, few comments are received, and the agency then modifies the rule in accordance with the negotiated agreement.[198] Of course, if an agency receives comments necessitating a change from the negotiated agreement, it must change the rule accordingly. By and large, the process seems to work fairly well.[199]

The setting of the challenge to a rule may explain why the parties negotiate before litigation rather than earlier in the rulemaking process. The challenge facilitates negotiations in at least four respects. First, the parties are well defined. Those who filed suits challenging the rules are eligible to participate in

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changed circumstances with respect to budget cutbacks and additional duties. Wash. Post, Aug. 11, 1981, at A13, col. 3.

[197] Cohen, *supra* note 194, at 881 (industry will consider dropping important legal points in exchange for modifications in regulatory language); W. MAGAT, L. GIANESSI & W. HARRINGTON , *supra* note 174, at 2-49 (discussing industry offer to give EPA opportunity to withdraw or amend regulations rather than filing lawsuit).

In Shell Oil Co. v. EPA, No. 80-1532 (D.C. Cir.) more than 40 petitions for review were filed concerning EPA's regulations issued under the Resource, Conservation and Recovery Act, 42 U.S.C. §§ 6901-6989 (1976 & Supp. IV 1980) (provisions governing solid waste disposal). Anthony Z. Roisman of the Department of Justice sent a letter to counsel for petitioners in the case asking each to submit a list of the issues intended to be pressed in the suit. He also requested counsel to "explain which problems raised by your client during the rulemaking have not been adequately addressed and which specific solutions to those problems suggested by your client in the rulemaking should have been adopted." Letter from Anthony Z. Roisman, Chief of Hazardous Waste Section of United States Dept. of Justice, to counsel (Sept. 5, 1980), Shell Oil Co. v. EPA, No. 80-1532 (D.C. Cir. filed Sept. 5, 1980) [hereinafter Roisman letter] (copy on file at *Georgetown Law Journal*). He then called a meeting of all counsel that had submitted a list of issues to discuss how the proceeding could be organized. The meeting was open only to the parties; a member of the press who sought admission was turned away. The Department of Justice and the EPA sought and received additional information on a number of issues. Roisman Interview, *supra* note 106. The Chairman of the Industry Steering Committee, Roger Streelow, indicated, however, that he thought very little new data was submitted; rather, the position could be clarified and expanded upon in a way that would address details. Interview with Roger Streelow, Chairman of Industry Steering Committee (July 29, 1981) [hereinafter Streelow Interview] (copy on file at *Georgetown Law Journal*). The EPA divided the issues into three categories: those with which it largely agreed with the industry position and with which it was willing to file a notice of proposed rulemaking in the *Federal Register* embodying the change; those with which EPA disagreed with the industry position but the distance between EPA and industry was so minimal that the EPA was willing to negotiate positions; and those with which EPA disagreed with the industry and the disagreement was sufficiently great that EPA was prepared to litigate the issue. Roisman Interview, *supra* note 106; Streelow Interview, *supra*.

[198] *See* Rogers Interview, *supra* note 107 (stating that when short response date for comments set, regulations seldom change after notice for public rulemaking). In one case, however, the EPA had established requirements for hazardous waste. 40 C.F.R. §§ 262.10-.51, 263.10-.31 (1980). The Solid Waste Management Association petitioned for further rulemaking to extend the coverage of the regulation to small scale generators and transporters. The EPA responded and published a proposed rule requiring expanded coverage. 45 Fed. Reg. 68,409 (1980). It received 250 comments. Government's March, 1981 Report on Status of Negotiations, Shell Oil Co. v. EPA, No. 80-1532 (D.C. Cir. filed Mar. 10, 1981) (copy on file at *Georgetown Law Journal*).

[199] *See* Streelow Interview, *supra* note 197 (describing agency reactions to successful negotiations). Mr. Roisman, however, argues that negotiations and settlement of lawsuits develop a counterproductive set of incentives. He argues that if a party knows it can settle a challenge to a rulemaking, the party is more likely to take extreme positions during the rulemaking proceeding because it can challenge the rule if it fails to achieve its goals. The parties also are likely to file a defensive challenge to a rule to ensure that they are included in any settlement discussions that may take place. Thus, a party who is satisfied with the rule may challenge the rule simply to protect its interest. Roisman Interview, *supra* note 106. Another attorney argued that publishing a notice of proposed rulemaking that reflects a settlement diminishes public participation because the public believes that the agency is locked into the choice that was developed with a narrow range of interests. Statement of L. Thomas Galloway, Wash. Post, Apr. 3, 1981, at A6, col. 1.

the settlement negotiations. Second, the issues are defined and ripe for decision. Each party has stated its initial position; the agency in the rule itself, and the parties in their challenges to the proposed rule.[200] Parties therefore can focus squarely on the issues separating them instead of either anticipating what someone else may say or fighting a legal straw man. Moreover, they can concentrate on the details of the issues, unlike the adversarial process of setting a rule in which parties must focus on the more important points.[201] Third, the agency recognizes that it does not control the ultimate decision because the final decision rests with the court. The agency therefore no longer acts as a sovereign; rather, it stands before the court on a rough par with the private parties. Finally, there is a deadline for reaching an agreement. If they do not settle the case or postpone its consideration, the court will decide. Thus, if the parties themselves are to negotiate an agreement, they must do so before the court moves. These four factors are important, perhaps essential, prerequisites for successful regulatory negotiation.[202]

### D. PUBLIC LAW LITIGATION

Another area in which public policy decisions closely resemble negotiated rules is public law litigation. After plaintiffs establish liability, the court frequently asks the parties to negotiate a remedy to be contained in the court's decree.[203] Negotiations take place within the context of the general conclusions of law and findings of fact made by the court.[204] Each party recognizes that it must respond to the demands of the other party in the negotiation process because any unresolved issues will be submitted to the court for its resolution.[205]

### E. NATIONAL COAL POLICY PROJECT

Perhaps the best known example in which parties that are usually adversaries negotiated numerous agreements concerning public policy was the National Coal Policy Project. This effort originated when Gerald L. Decker, Corporate Energy Manager of Dow Chemical Company, concluded that Dow needed to use more coal to generate electricity, but that major environmental problems could delay implementation of its plan.[206] He decided that it would be appropriate to bring the parties in interest together to discuss the environmental issues surrounding the increased use of coal, rather than wait for the adversarial process to begin.[207] He approached Laurence I. Moss, formerly the President of the Sierra Club, and inquired about the feasibility of organizing a group of environmentalists to meet with industry representatives about coal issues.[208] Although Moss was at best lukewarm about the idea, he convened a meeting of environmentalists to discuss the invitation.[209] Many environmentalists were hostile to the idea. Some denounced it as a sell-out to industry and refused to participate; others, however, agreed to negotiate.[210]

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[200] Another beneficial aspect of a settlement discussion is that the Department of Justice sometimes acts as a mediator helping the parties to redefine the issues, to assess their true interests, and to attempt to reach an accommodation. Interview with Joseph B. Scott, formerly of the Civil Appellate Division, U.S. Department of Justice (July 16, 1981) [hereinafter Scott Interview] (copy on file at *Georgetown Law Journal*).

[201] *See supra* notes 170-71 (discussing how adversarial process causes parties to overlook details).

[202] *See infra* text accompanying notes 239-41 (discussing requirement that negotiation must benefit party before incentive to participate exists).

[203] Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1298 (1976).

[204] *Id.* at 1299-1300.

[205] *See id.* at 1281 (discussing advanced role of federal judiciary in determining issues of public law).

[206] Interview with Francis X. Murray, Project Director of National Coal Policy Project, Center for Strategic and International Studies, Georgetown University (May 19, 1981) [hereinafter Murray Interview] (copy on file at *Georgetown Law Journal*). In part because of his participation in studies performed under the auspices of the Technical Advisory Board of the Department of Commerce, Decker concluded that it was important for the United States to shift from the use of oil and natural gas to coal. Decker and others concluded that it would not occur without the reconciliation of environmental and

The identification of interests and the creation of networks led to the formation of industry and environmental coalitions as the initial members identified others who should participate. Decker and Moss decided that a neutral third party should chair the meetings and that an institutional home was necessary to provide administrative support.[211] John Dunlop chaired the first meeting, and thereafter Francis X. Quinn of the Temple University Business School served as chairman.[212] Georgetown University's Center for Strategic and International Studies became the sponsor, and its Francis X. Murray functioned as the project director.[213] Five government agencies, four foundations, and eighty corporations provided funding for the enterprise.[214] The participants broke into a series of task forces to consider various aspects of the increased use of coal.[215] At the outset, they agreed that because of basic value differences, agreement on certain issues would be impossible even if the parties agreed on the facts. In those instances the parties stated their respective views and the reasons for not attempting decision.[216]

The parties involved in the National Coal Policy Project reached agreement on over two hundred recommendations, some of which had far reaching import.[217] Although no regulatory agency participated directly in the negotiations, several attended as observers. The agencies stated that they did not want to be voting participants because they wanted to preserve their political flex-

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industrial interests. [Summary and Synthesis] WHERE WE AGREE: REPORT OF THE NATIONAL COAL POLICY PROJECT 1 [hereinafter NCPP SUMMARY].

[207] NCPP SUMMARY, *supra* note 206, at 1.

[208] *Id.*

[209] *Id.*

[210] *Id.* Interview with Laurence I. Moss, former President of Sierra Club (Apr. 2, 1981) (copy on file at *Georgetown Law Journal*) [hereinafter Moss Interview]; Murray Interview, *supra* note 206; NCPP SUMMARY, *supra* note 206, at 1.

[211] Moss Interview, *supra* note 210.

[212] *Id.*; NCPP SUMMARY, *supra* note 206, at 2.

[213] [Volume 1] WHERE WE AGREE: REPORT OF THE NATIONAL COAL POLICY PROJECT iii (1978) [hereinafter NCPP VOLUME 1].

[214] NCPP SUMMARY, *supra* note 206, at 67-68. The expenses of participating environmentalists were paid from contributions from the foundations and government agencies in order to avoid any appearance that the environmentalists had a conflict of interest by receiving corporate funds. *Id.*; Murray Interview, *supra* note 206.

[215] The task forces were mining, transportation, air pollution, fuel utilization and conservation, energy pricing and emission charges. NCPP SUMMARY, *supra* note 206, at vii.

[216] NCPP SUMMARY, *supra* note 206, at xvii; *see* NCPP VOLUME 1, *supra* note 213, at 131-47 (discussing unresolved issues of Air Pollution Task Force).

[217] Most of the recommendations reflect broad, general agreement. Overall, they do not include the details of how the agreement could be implemented. Nor are they sufficiently detailed that they could be used as a regulation. *See* NCPP SUMMARY, *supra* note 206, at 9-13 (stating that various policies should be adopted).

ibility. By refraining from voting, the agencies were able to evaluate the recommendations as a group and to pick and choose the recommendations they wished to use as a basis for proposed rulemaking.[218] Although it did not attribute the recommendation to the Coal Policy Project, the Federal Energy Regulatory Commission (FERC) used one recommendation as the basis of a proposed rule.[219] Another agency, the Office of Surface Mining (OSM) of the Department of the Interior, opposed the Project recommendations on the grounds that it did not participate in the development of the recommendations.[220] Although the full effect of the Project on public policy in general, and on regulatory issues in particular, remains unclear,[221] it has been widely heralded as an important attempt to establish a policy dialogue among conflicting interests and to reach a consensus on policy.[222]

### F. DIALOGUE GROUPS

Corporate and environmental interests have engaged in "dialogue groups" concerning the regulation of toxic substances.[223] Sam Gusman of the Conservation Foundation developed this process as a result of his quest to find a "better way" than the adversarial process to develop regulations. Although the nearly uniform response to his suggestion was that it probably would not work, many expressed interest in participating if such a group were empaneled. A group was convened, with Gusman acting as facilitator to help define the issues, to build trust and to transmit the work product to the relevant parties. The group began with a relatively easy issue in order to build trust.[224] As the group explored more complex areas, they brought in individuals with a particular expertise, and the original group developed into a steering committee for a number of dialogue groups that worked on the respective issues. The groups reached consensus recommendations on a number of issues.[225]

### G. ENVIRONMENTAL NEGOTIATION

By far the widest range of experience with negotiating agreements on issues with significant public policy ramifications has occurred in the environmental area. Most of these negotiations have involved a specific dispute over the environmental consequences of a particular action at a specific site.[226] Thus, the scope of these negotiations is closer to decisionmaking in an adjudicatory context than in a rulemaking context. The subjects negotiated include the location of a highway in the face of competing values and interests among the affected citizens;[227] the effect of a uranium mine on the environment and the actions a mining company would take to mitigate adverse consequences;[228] the actions of industrial plants to reduce pollution;[229] the construction of dams;[230] the access to beaches on nonpublic land;[231] and the coordination of several government agencies concerned with different aspects of the Columbia River.[232]

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[218] Murray Interview, *supra* note 206.

[219] *Id.*

[220] *Id.* The OSM may only have been responding to the views of an important constituent. Some of the more vocal environmental groups that were extremely active in securing strip mining legislation refused to participate on the ground that any agreement reached could only compromise the goal of the new legislation. M. WESSEL, *supra* note 80, at 171-72.

[221] *See Joint Hearings Before the Select Comm. on Small Business and the Subcomm. on Oversight of Government Management of the Senate Comm. of Governmental Affairs on Regulatory Negotiation*, 96th Cong., 2d Sess. 7 (1980) (Statement of Harrison Loesch, Vice President, Government Relations, Peabody Coal Company) (several bills currently before Congress contain Project recommendations; host of regulatory recommendations adopted, and many Project board policy recommendations of the Project have entered the national policy debate) [hereinafter *Regulatory Negotiation Hearings*]; *Introduction* to [Overview 1976-1981] WHERE WE AGREE: REPORT OF THE NATIONAL COAL POLICY PROJECT (1981) [hereinafter NCPP OVERVIEW]. The final stage of the project is an assessment of the entire process, and that is currently underway. Moss Interview, *supra* note 210.

[222] NCPP OVERVIEW, *supra* note 221 (collection of articles, letters, and commentary concerning project).

[223] *Regulatory Negotiation Hearings, supra* note 221, at 55-56 (Statement of Sam Gusman, Senior Associate, Conservation Foundation).

[224] The first topic was the need for additional toxicologists. *Id.* at 56.

[225] Interview with Sam Gusman, Senior Associate, Conservation Foundation (June 17, 1981) [hereinafter Gusman Interview] (copy on file at *Georgetown Law Journal*).

This body of experience has generated extensive literature analyzing various instances of negotiation and mediation.[233] Negotiation has become so established and widespread in the environmental area that the Conservation Foundation publishes a quarterly newsletter devoted to "environmental dispute resolution."[234] Similarly, a number of organizations have been established to aid parties in resolving conflicts concerning environmental questions.[235] The best known of these groups is perhaps the Institute for Environmental Mediation, the successor of the Office of Environmental Mediation of the University of Washington. It was founded in 1973 and is funded primarily by foundations for the purpose of providing experienced mediators to help settle disputes through negotiation.[236]

Environmental negotiations raise many of the same issues, but by no means all, that negotiation among interested parties developing a proposed rule would raise. For example, environmental negotiations are frequently polycentric, that is, they are "characterized by a large number of possible results and by the fact that many interests or groups will be affected by any solution adopted."[237] Environmental negotiations, therefore, must resolve clashes of competing values for which there are no explicit right or wrong answers. They require the identification of interests affected by the dispute resolution that should be parties to the negotiation. Further, environmental negotiations require identification of the appropriate representatives of the respective groups. Finally, resolution of environmental disputes frequently requires the satisfactory determination of complex factual issues. Thus, the principles of environmental negotiation, both theoretical and practical, are generally applicable in the regulatory context.

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[226] *See generally* L. Susskind, L. Bacon & M. Wheeler, Resolving Environmental Regulatory Disputes (1982) (unpublished collection of case studies of environmental negotiation and mediation) (to be published under contract with Environmental Protection Agency).

[227] A. Talbot, Environmental Mediation: Three Case Studies 15 (1981) (construction of Interstate 90 in Seattle, Washington).

[228] *See supra* text accompanying notes 162-65 (concerning Homestake Mining Company's pitch mine).

[229] *See generally* T. Sullivan, The Colstrip Power Plant Controversy, in L. Susskind, L. Bacow, & M. Wheeler, *supra* Note 226 (unpublished report prepared for the Environmental Negotiations Project, Laboratory of Architecture and Planning, under grant from EPA) (detailing dispute over Montana power company's addition of two coal fired electric power plants to facilities at Colstrip, Montana).

[230] *See supra* text accompanying notes 160-61 (discussing dispute over construction of Snoqualmie Dam in state of Washington).

[231] *See generally* A. Talbot, *supra* note 227, at 5 (beaches on Portage Island, Washington to be reached via sand bar owned by Lummi Indian tribe).

[232] Gusman Interview, *supra* note 225. Gusman mediated the negotiation between EPA, Department of Interior, Department of Commerce, Port Authority, and several state agencies.

[233] G. Bingham, B. Vaughn & W. Gleason, Environmental Conflict Resolution (1981) (annotated bibliography published by Conservation Foundation).

[234] The Conservation Foundation's newsletter, Resolve, is the successor to Environmental Consensus, formerly published by RESOLVE, Center for Environmental Conflict Resolution.

[235] *See Update*, in Environmental Consensus 7-8 (Winter 1981) (list of eleven groups established to resolve environmental conflicts).

[236] Brochure of the Institute for Environmental Mediation (description of functions of the Institute for Environmental Mediation) (copy on file at *Georgetown Law Journal*).

Negotiations of complex technical standards, settlements of lawsuits challenging regulations, decrees in public law actions, recommendations of the National Coal Policy Project and the toxic substances dialogue groups, and the agreements settling environmental disputes all reveal the principles that guide the use of negotiation for developing regulations.[238]

## V. Negotiating Regulations

What follows is a proposal designed to make negotiating rules attractive to agencies and to the affected private interests. It is derived from the accumulated experience in and analysis of areas in which policy has been negotiated. The proposal is also designed to provide appropriate legal safeguards to protect the rights of those affected by a regulation and to prevent abuse. Although these safeguards are based on traditional notions of administrative law, they are adapted to the negotiation situation.

The following proposal is made up of several interrelated components. Its overall goal is to provide a structure for more direct and effective participation by those interested in rulemaking. The success of any single component of the proposal, however, is not determinative of its overall success. For example, it would not be a legitimate criticism of a negotiation to say that a consensus could not be reached on implementation language or on all facets of a proposed rule if the process narrowed the issues and reduced hostilities, facilitating the development of the final rule. Thus, the components of a proposal should be assessed separately and in light of the ultimate goal of the negotiation.

### A. CONDITIONS THAT IMPROVE THE LIKELIHOOD OF SUCCESSFUL NEGOTIATIONS

Negotiating is no more appropriate for developing all proposed rules than it is for settling all disputes. In this context, as in others, the "hot tub" theory is not true: people do not get together to resolve disputes with openness and reasonableness simply because the process is labeled nonadversarial.[239] A party must believe that it will benefit from negotiation.[240] Indeed, no party will agree to use *any* forum to reach a decision in which it is interested unless, all things considered, it believes it is more likely to achieve its overall goals by using that process instead of some other available decisional process.[241]

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[237] Boyer, *supra* note 30, at 117 (defining and giving examples of polycentric problems).

[238] *See infra* text accompanying notes 278-85 (summary of principles favoring use of negotiation: balance of powers; limited number of parties; ripe issues; inevitability of regulation; mutually acceptable criteria; and expectation that negotiated agreement will influence outcome).

[239] *See supra* text following note 173 (discussing "hot tub" view of negotiations; belief that parties favor process because labeled nonadversarial).

For example, in the simple situation in which a consumer believes that he purchased defective goods from a store, he must decide whether to seek reparation by negotiation with the store, by filing suit, by complaining to the dealer's manufacturer, by going to the Better Business Bureau, or by some combination of these alternatives. The store may conclude that negotiation is in its interest and, therefore, offer to negotiate or settle in response to the purchaser's initial inquiry. The store's decision to negotiate may be based on the conclusion that the store is unlikely to win the lawsuit and that it may be able to achieve more or to lose less through negotiation. Or, the store may look beyond the individual dispute to its long run interests in maintaining its good relations with its customers, the manufacturer, or the business community and negotiate despite its belief that it was not at fault and would prevail in litigation. Thus, each party attempts to determine which method of resolving the complaint would maximize its return and to use that process to reach a decision.[242]

The process that is ultimately used must take account of the relative power of the parties.[243] Power derives from various sources. Power may stem from bargaining strength. An example of such bargaining strength would be a situation in which a landlord commands a high price because little alternative space is available, and the tenant is not "entitled" to a low rent.[244] The landlord in such a situation has a great deal of leverage. In the regulatory context a party may have power because of its significant political clout or strong factual argument. Norms that can be enforced to guide the resolution of the matter, such as rent control, also may be a source of power. In the bargaining over rent in the above example, the dwelling may be subject to rent controls. In such a situation, discussions would focus on application of the norms, as embodied in the regulations, to the circumstances at hand. Similarly, if a statute specifies the criteria to be used in developing a regulation, the parties' discussions would center on applying those criteria. In the latter two examples, if discussions break down, the parties can invoke a formal process by which to make the decision.[245] Power also may derive from the ability to invoke alternative decisional processes. The process used may influence the extent to which bargaining power or norms enter into the decision. Moreover, the process may have a substantial effect on costs, delay, uncertainty, and the parties' participation in the decision.[246]

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[240] For a critique of the literature analyzing incentives to bargain and how the bargainers determine their outcome by discounting other means of reaching decisions, see S. Bacharach, E. Lawler & J. Shedd, *Critique of Bargaining Theory*, in S. BACHARACH & E. LAWLER, BARGAINING: POWER TACTICS AND OUTCOMES 1-40 (1981). For a discussion of the alternative mechanisms for resolving disputes, see R. LUCE & H. RAIFFA, GAMES AND DECISIONS viii (1957) (discussing game theory as individual decisionmaking in the context of conflict with other individuals and inherent risk in outcomes); Boyer, *supra* note 30, at 111 (contrasting attributes of trial type hearings with other forms of decisionmaking available to administrative agencies); Fuller, *Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 353 (discussing possible variation in elements that constitute form of adjudicatory process); Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 305 (1971) (discussing value of mediation and analyzing various situations characterizing need for and functions performed by mediator); Sander, *Varieties of Dispute Processing*, 70 F.R.D. 79, 79 (1976) (discussing alternative ways of resolving disputes outside the courts to reduce caseload of federal judiciary).

[241] Eisenberg, *supra* note 127, at 675-76 (discussing various means by which stronger party may be induced to enter negotiations).

[242] The President's Commission for a National Agenda for the Eighties stated in its report: "Procedures, because they assign roles to various interest groups or institutions in the setting and implementing of policy, determine the relative influence of the parties affected by regulation." GOVERNMENT AND REGULATION, *supra* note 14, at 46.

[243] "Assumption 1: Power Is the Essence of Bargaining." S. BACHARACH & E. LAWLER, *supra* note 240, at 43.

[244] The example is from Eisenberg, *supra* note 127, at 667-71.

Each of these forms of power must be considered in developing a process for regulatory decisions. If, for example, one party has strong bargaining power, it would be inappropriate to use negotiation to develop a regulation because the prevailing norms might be ignored or a party might surrender the power it derived from the traditional process. Nor is it realistic to believe that the norms will be the exclusive manner of decision if one party has sufficient bargaining power to alter the governing norms. Thus, the decisional process must accommodate the various forms of power the parties in interest possess.[247] Negotiation should be viewed as an alternative method of rulemaking to be used when it is superior to other processes. Therefore, it is necessary to determine the conditions in which negotiations are appropriate.

The discussion that follows identifies several criteria for deciding whether negotiations are likely to produce a sound regulation or to facilitate the regulatory process.[248] The fulfillment of all the conditions identified here is by no means necessary for fruitful discussions.[249] Moreover, even if several criteria are not satisfied, negotiations may still lead to a sound regulation.[250] In addition, experience may demonstrate that other factors are equally important in determining whether the process is effective. The following criteria are predictive and are based on experiences in analogous situations in which complex policies have been successfully negotiated.

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[245] That the bargaining would be guided by norms does not mean that a formal mechanism exists for resolving an impasse. Thus, many relationships, such as parent-child, union-management, store-customer, professor-student, exhibit features of dependency and/or intimacy that inhibit the parties from seeking resolution through the intervention of a third party. Eisenberg, *supra* note 127, at 672-73.

[246] Eisenberg points out that participation is important in its own right and that people frequently will resist imposition of a decision on them even if the decision is in their interest. *Id.* at 675-676.

[247] As Gerald Cormick, Director of the Institute for Environmental Mediation, points out, negotiation is not a way of avoiding conflict or the clash of power; rather, it is a process for reaching a decision that reconciles the competing interests. Cormick, *The "Theory" and Practice of Environmental Mediation*, 2 ENVTL. PROF. 24, 25, 28 (1980).

[248] Clark & Cummings, *Selecting an Environmental Conflict Management Strategy*, in ENVIRONMENTAL CONFLICT MANAGEMENT 10 (1981) (Council on Environmental Quality and Geological Survey of United States Department of Interior analysis of environmental conflicts to select most appropriate settlement approach); Marcus, *A Procedure for Assessing Environmental Disputes*, in ENVIRONMENTAL CONFLICT MANAGEMENT 34 (1981) (describing procedures for determination of causes and means of resolution of environmental disputes).

[249] Susskind and Weinstein observe that we simply do not yet have enough experience to develop a set of criteria to determine whether an environmental dispute can be negotiated. Susskind & Weinstein, *supra* note 92, at 356.

[250] For example, theory dictates that a mediator be rigorously neutral. Yet, one major environmental negotiation involving several federal and state agencies, as well as private parties, succeeded primarily because of the perceived bias of the mediator. One of the central parties that had rejected previous overtures to negotiation agreed to participate only because of the perceived bias. H. Burgess, The Foothills Water Treatment Project: A Case Study of Environmental Mediation, in L. Susskind, L. Bacow & M. Wheeler, *supra* note 226 (unpublished report prepared for the Environmental Negotiations Project, Laboratory of Architecture and Planning, Massachusetts Institute of Technology, under grant from EPA).

### 1. Countervailing Power

If a party has the power to achieve its goal, it naturally will exercise that power. For example, a local group's objections to a company plan to build a plant may go unheard unless it has some power to prevent the building of the plant. In the regulatory context, a party may have the power to dictate the outcome of a regulation, either because it has enormous political strength and could obtain legislation incorporating the regulation, or because its position is so strong that it would carry the day before the relevant agency or before the court reviewing the rule. In such a situation, the party could achieve its wishes without compromising at all if the wishes were within the confines of the governing norms. Therefore, the dominant party would have no reason to negotiate with the other parties. For example, negotiators in the National Coal Policy Project did not consider some issues because some parties thought that they had sufficient power to achieve their will in Congress.[251]

On the other hand, the various interests may have sufficient power so that no single party could achieve its will without dealing with the others. A party may derive its countervailing power from its ability to invoke a proceeding in which some third party will decide the issue and the governing norms are not sufficiently clear to permit prediction of the outcome; the ability to precipitate doubt on the outcome is a form of power. Even if the governing norms are relatively clear and one party would ultimately succeed on the merits, a party may have countervailing power because it can inflict significant costs or delay on the party.[252] A successful party therefore must deal with other parties that have the power to block its unfettered will. For example, when the displeased customer seeks reparation from the store, even if the store ultimately prevails, the store's victory may have come at an unacceptable price because of the costs and delay of the complaint. Similarly, in the negotiations leading to the agreement concerning the uranium mine,[253] the environmentalists' power rested in their ability to delay the company's use of the mine by challenging the environmental impact statement prepared by a government agency. Although the company was confident of succeeding on the merits, it decided that direct negotiation was in its interest.[254]

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[251] As the report of the project explains,

> Several of [the] unresolved issues were addressed by Congress in the 1977 amendments to the Clean Air Act and neither side was willing to make a commitment to a definite position on those issues while the Congressional deliberations were continuing. Once the amendments were enacted, there was very little room left for discussion because industry, on the whole, wanted to weaken significantly the statutory language and environmentalists were largely satisfied with the outcome, although they would have liked a few strengthening amendments.

NCPP SUMMARY, *supra* note 206, at 132.

[252] A party also may have power because of its ability to harass or to flood the media with shrill, unreasonable positions used to build a political base.

[253] *See supra* notes 162-65 and accompanying text (describing controversy between Homestake Mining Company and environmentalists over pitch mine site in Colorado).

The first consideration in deciding whether negotiation is appropriate is to determine whether any party has the power to achieve its will without having another party impose a sanction which the first views as unacceptable. If a party can achieve its will and thus control the outcome, negotiation is inappropriate. The more rigorous safeguards of the traditional process would be necessary to protect the other interests. But this is in itself a form of power because the weaker interests may be able to extract concessions from the dominant interest to avoid the delay, expense, and inherent uncertainty of the more formal process.

If the countervailing power among the parties is balanced such that the outcome of the conflict is genuinely in doubt, then negotiations among the parties may be the appropriate way to reconcile the competing interests. Before negotiations can be successful, however, the dominant parties themselves would have to recognize that it is in their respective interests to deal with each other as equals in attempting to reach a mutually satisfactory decision.[255] The dominant parties would have to believe that negotiation would enable them to avoid the time, expense, cost, and uncertainty of another process. The party might, for example, refuse to negotiate in good faith and instead seek judicial or congressional action. In sum, the parties themselves must believe that it is in their interests to negotiate the policy with the other parties, and that other means of exercising power are frustrated by countervailing power of one or more interested parties.[256]

### 2. Limited Number of Parties

Negotiations will clearly not work among an auditorium full of people. The give and take of issues and positions can only occur with a limited number of participants, probably fewer than fifteen.[257] Thus, negotiation would be inappropriate for a regulation that would affect many interests in such diverse ways that representation by a few individuals or teams of individuals would be impossible.[258] For example, an environmental regulation may apply generally to all industry, and yet affect each industrial sector differently enough so that even several individuals could not represent the interests of all of the sectors. In that case, negotiation would not work.

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[254] Watson Interview, *supra* note 165. Both sides were content with the outcome and considered the process as more productive than litigation. *Id.*

[255] Cormick, *supra* note 247, at 28 (successful negotiations require parties to deal with each other as equals seeking mutual satisfaction).

[256] *Id.* (successful negotiations require that each party have enough power to prevent others from taking unilateral action).

[257] There is no particular magic in the number 15; rather, it seems difficult to get more people than that around a table in reasonable comfort. Certainly more than 15 have participated in negotiations, but 15 people seems to be a rough practical limit. For example, the National Coal Policy Project's working task forces consisted of approximately that number. NCPP SUMMARY, *supra* note 206, at 57-60.

[258] Each interest represented in the negotiations may consist of a number of different people. For purposes of negotiation the parties may form a caucus that is represented by an individual or team of individuals. That is, of course, a typical way of participating in traditional forms of rulemaking in which a trade association or other group represents the interests of a number of different organizations.

### 3. Mature Issues

The purpose of negotiation is to reach a decision that accommodates the interests of the parties affected. The issues to be resolved, therefore, must be "ripe" for decision. For example, if the parties are still jockeying for position by filing lawsuits or threatening to do so,[259] building a media campaign, lining up political support, or exercising other methods of generating and demonstrating power, the issues have not yet crystallized sufficiently to permit resolution. Although such behavior is a legitimate prelude to negotiation, it may preclude a necessary party from participating at that time.[260] Similarly, a party may still be organizing or posturing to demonstrate to other parties that it has sufficient power to impose a sanction. Alternatively, the issue itself may not be ready for decision because the interests involved in its resolution cannot yet be identified or information on the issue is insufficient. The subject matter of the negotiation, therefore, needs to be a concrete issue.

### 4. Inevitability of Decision

The parties will not expend the resources required for negotiation unless they are convinced that they will benefit from negotiation. Parties frequently may benefit by delaying a decision, and it seems to be human nature to procrastinate until action is required. Thus, negotiations are likely to work best if a decision is inevitable, or even better, imminent. If the decision is inevitable or imminent, and the parties in interest fail to reach an agreement by negotiation, someone else will make the decision. In the regulatory context, this situation may occur if a statute, a court order, or an overriding political pressure requires agency action within a particular time. This situation also could occur if the agency has committed itself to a schedule in the regulatory agenda,[261] or has announced a schedule for action on an ad hoc basis. In such cases, if the parties fail to reach agreement, the agency itself, or in some situations, a court or Congress, makes the decision.[262] The most favorable climate for negotiation occurs when all the parties believe that there is some urgency for reaching a decision.[263] The inevitability of a decision creates that urgency to a degree. The parties then feel pressure to reach a decision themselves before someone else makes the decision and deprives them of control.

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[259] *See* D. Smith, A Case Study of Environmental Mediation: The Brayton Point Coal Conversion, in L. Susskind, L. Bacow & M. Wheeler, *supra* note 226 (unpublished report prepared for Environmental Negotiation Project, Laboratory of Architecture and Planning, Massachusetts Institute of Technology, under grant from EPA), in which the New England Power Company filed suit against the Federal Energy Administration (FEA) when it issued a notice of its intent to prohibit the burning of oil. Even though negotiations subsequently began, the Department of Energy, the successor to FEA, continued formal proceedings to provide an incentive to continue the negotiation process. *Id.*

[260] Cormick Interview, *supra* note 167 (parties in process of building power not ready to join negotiations).

[261] Exec. Order No. 12,291, § 5, 3 C.F.R. 127 (1981) (agencies shall publish regulatory agenda twice a year). A regulatory agenda consists of a listing of "proposed regulations that the agency has issued or expects to issue, and currently effective rules that are under agency review." *Id.*

[262] Although this may appear to concede that the agency has the unilateral power that is antithetical to negotiation, in fact the agency may be unable to control the decision because the parties would have a significant role in developing the record and seeking an appeal. If the parties themselves, including the agency, do not reach a negotiated decision within the allotted time frame, however, they will lose the ability to share in its formulation directly. In addition, its outcome will be cast in doubt precisely because no one will be certain how the clash of interests will be reconciled by the third party decisionmaker.

[263] Cormick, *supra* note 247, at 28.

Despite the attraction of delay, in some instances a prompt decision may serve the parties' interests. For example, a company may wish to manufacture a new product or build a new plant and an agency plans to issue regulations that will control aspects of the decision. The company may be afraid to proceed because it fears that it may incur the substantial cost of modifying the product or plant in response to the new regulation. The company then would prefer a prompt decision by the agency. An opposing interest also may prefer a prompt decision if the regulation appears to effectuate that party's interest. In such a case, delay is not in the interest of either side.

Even if delay is in a particular party's interest, such as when the regulation will necessitate expensive retrofitting or large capital expense, the issue still may be suitable for negotiation if the implementation date is among the issues negotiated. Assuming that some decision is inevitable, if the implementation date is included in the issues negotiated, the reluctant party may prefer the certainty of outcome. The party thus may be willing to negotiate if it stands to gain time to implement the regulation.

### 5. Opportunity for Gain

Because a party would participate in negotiation only if it viewed itself as being better off for having done so, negotiation is not likely to be successful in "zero sum games," situations in which one party wins only to the extent that another loses.[264] Thus, unless the dispute can be transformed into a "win/win" situation in which both parties are better off for having negotiated,[265] negotiation may not succeed.

For example, in the negotiations involving the Snoqualmie Dam, the original dispute was a zero sum situation. Environmentalists wanted to stop the construction of the dam and the farmers wanted to proceed.[266] Through negotiation the parties agreed on a common goal and turned the dispute into a "win/win" situation, in which the farmers got their dam and the environmentalists preserved the valley. Similarly, in a dispute between the Environmental Protection Agency (EPA) and a paper mill, the EPA's initial position required the factory to incur great expenses for retrofitting existing boilers to reduce air pollution.[267] The parties negotiated a solution that required the factory to construct a new boiler. The solution satisfied EPA's concerns and also reduced the operating costs of the factory. The zero sum dispute thus was converted into a

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[264] *See* R. LUCE & H. RAIFFA, *supra* note 240 (an introduction to game theory).

[265] Clark & Cummings, *supra* note 248, at 11. Clark and Cummings distinguish "collaboration," which is the "win/win" situation, from negotiation, which they describe as lying between collaborative and "win/lose." In the "win/win" situation all parties have a common goal and in the "win/lose" situations parties must trade interests and make compromises to achieve what they desire. *Id.*

[266] *See* Sviridoff, *supra* note 160 (discussing Snoqualmie Dam negotiations); Susskind, *supra* note 83, at 3 n.6.

[267] D. Gilmore, Environmental Negotiations: A Case Study Between the EPA and the Brown Company over Brown's Berlin, New Hampshire Pulp and Paper Mill, in L. Susskind, L. Bacow & M. Wheeler, *supra* note 226 (unpublished report prepared for Environmental Negotiation Project, Laboratory of Architecture and Planning, Massachusetts Institute of Technology, under grant from EPA).

"win/win" situation.[268]

To assess whether a dispute can produce a "win/win" outcome one must look to the future rather than to the current situation. For example, imagine a giant city-wide bubble within which EPA would regulate the total emission of a particular gas from all sources. The various polluters inside the bubble would perceive the setting of limits on their respective discharges as a "zero sum" game because to the extent one would win, others must lose. From this perspective, the polluters might view negotiation as inappropriate because no company would have an incentive to give away to another company its limited ability to discharge its gas. On the other hand, if the companies failed to agree among themselves on the allocation of the individual levels, some other forum, such as the EPA or a court, might impose limits on the respective companies. In such a situation, the parties may believe that it is in their interests to agree among themselves. They could reach a more satisfactory result because they would have some control over the decision. Such control would be particularly important if the prevailing norm were viewed as irrational.

### 6. Fundamental Values

Competing interests cannot negotiate an agreement if the disputed issue concerns fundamental values. Surely, no agreement could be reached over which of several religions is superior. As a more practical example, the parties involved in the National Coal Policy Project initially decided that because some issues were so value laden, they would not even attempt to reach an agreement on them.[269] In the Homestake Mine negotiation, the parties decided that negotiations would not extend to issues relating to the company's uranium mill and its disposal sites, which were the subject of hearings before state agencies.[270] Rather than focusing on these value-laden issues, in both instances, negotiations centered on the particular, mature issues of a less global nature.[271]

In the regulatory context, the more the parties agree on fundamental principles that shape the decision, the more likely it is that negotiations will be successful. If the fundamental issues cannot be resolved because the regulatory statute is vague, the situation may closely resemble a debate over the superiority of various religions and the parties may be unable to reach an agreement. If the issue is too basic for compromise among the parties, an alternative forum is required to resolve the matter.[272] For example, it seems unlikely that OSHA, the unions, and industry initially could agree through negotiation on the extent to which OSHA must, or may, consider costs in setting occupational health standards.[273] Once the conflict in fundamental value questions is resolved, however, the parties may use the resolution as a basis for negotiating agreements on individual regulations.

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[268] *Id.* Although Clark and Cummings may be theoretically correct to distinguish the "win/win" situation from negotiations, *supra* note 265, even if both parties end up better off—the "win/win" situation—a great deal of negotiation would still be conducted because neither party would achieve all of its goals. Thus, mutual sacrifice through negotiations usually occurs and true collaboration is rare.

[269] > We were not so naive as to believe that all differences would or could be resolved in a non-adversarial forum. On some issues the values of the protagonists are too far apart to make agreement possible, even when they agree on the facts. In these cases we state our disagreement and our understanding of the reasons for it.

NCPP SUMMARY, *supra* note 206, at xvii. The four areas of disagreement in the Air Pollution Task Force were the application of the best available control technology, the prevention of significant deterioration of air quality, the siting of plants in nonattainment areas, and the interrelationship of air and water pollution and land use. NCPP VOLUME 1, *supra* note 213, at 131-47.

[270] Homestake Mining Company and Coalition of Colorado Environmentalists, Joint Press Release (Apr. 15, 1981); Danielson Interview, *supra* note 162; Watson Interview, *supra* note 165.

[271] *See supra* note 164 (mediation agreement between Homestake Mining Company and eight conservation organizations).

### 7. Permitting Trade Offs

The prime benefit of negotiations is that the parties affected by a decision can identify the issues involved, scale their respective importance, trade positions, and work out novel approaches in an effort to maximize their overall interests. Parties may yield on issues that have lower priority to improve their position on issues that have higher priority. This scenario, of course, assumes that there are multiple issues to trade. Negotiations are likely to be difficult when there is only one issue with a binary solution involved in the decision. In such a situation, because there will be a clear winner and a clear loser, there would be virtually nothing to negotiate. Thus, a regulation raising only a single issue, or even a very few issues, is an inappropriate candidate for negotiation.[274] Very few regulations, however, involve a single or only a few issues. Most regulations raise a great number of issues suitable for discussion. For example, a regulation may encompass issues such as the extent of the problem, the stringency of the response, the manner of compliance, the components of the regulation, and the date of implementation.

### 8. Research Not Determinative of Outcome

Information is clearly a form of power. If one party controls information that bears directly on a regulation, its power to control the outcome is greatly enhanced. A corollary of this power is that negotiation may be inappropriate for regulations requiring basic research because a party may not wish to commit itself in advance to accepting the results of such research. The parties may agree during negotiation on what research is needed and the protocol for the research.[275] If certain research results dictate a particular regulatory result, however, the parties may not wish to participate in a joint research endeavor unless they have a relatively good idea of the results the research will generate. It may be in the parties' best interests to disown or attack the research. Thus, successful negotiation is unlikely when fundamental research is necessary, the outcome is in substantial doubt, and the outcome would dictate the regulatory result.

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[272] Harrison Loesch, a participant in the Coal Policy Project testified: "Where . . . the problems are those of attitude and philosophy not subject to scientific quantification, I have come to the belief that the only solution is through the courts." *Regulatory Negotiations Hearings*, *supra* note 221, at 8 (testimony of Harrison Loesch, Vice President, Government Relations, Peabody Coal Company).

[273] *See* American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 506-07 (1981) (industry argues that in developing cotton dust standard, OSHA must consider whether reduction in material health impairment risks are significant relative to cost; government argues that cotton dust standard must reduce "to the extent such protection is technologically and economically feasible"); Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 639 (1980) (industry argues definition of health and safety standard, "reasonably necessary and appropriate," requires benzene standards to reflect quantification of costs and benefits; government argues definition does not modify requirement that standards reduce risk to lowest level feasible).

[274] Professor Stewart uses the location of a major energy facility in a scenic wilderness as an example of a single issue regulation. There is not likely to be any middle ground for compromise between industrial proponents and environmental opponents. Stewart, *supra* note 112, at 1345 n.266. Another commentator suggests that the decision whether to include air bags in cars is not amenable to negotiation. Note, *supra* note 96, at 1880. If the sole issue were whether to require air bags, that observation might be valid. There are, however, a range of negotiable issues, including the use of air bags, the use of passive restraints, the requirement that air bags be made available as an option, and their inclusion in certain sized cars but not others. Thus, because a range of choices is available on each of these issues, negotiations would be an appropriate forum for their resolution.

Nevertheless, negotiations may be appropriate when research would open up a range of regulatory alternatives or when the research results would not resolve certain issues involved in the negotiation. For example, research determining the adverse health effects of exposure to a chemical would not determine the manner and stringency of regulations governing exposure to the chemical. Moreover, negotiations may be appropriate even when fundamental research is necessary and the research findings cannot be predicted, but will dictate the resolution of the question. For example, in a dispute over the effects of dredging on neighboring wetlands, both parties agreed to accept the results of the forthcoming research because one party knew it could not win if research revealed an adverse effect and the other party knew it would withdraw its objection if no adverse effects were demonstrated.[276]

### 9. Agreement Implementation

The parties may be unwilling to invest resources necessary to reach an agreement if implementation of that agreement is unlikely.[277] Thus, in the regulatory context, negotiations probably would not produce satisfactory results if the negotiators believed that the agency would not use the results of the agreement. Nevertheless, agency action would be irrelevant if the parties themselves could implement the agreement. Additionally, negotiations must be structured to protect the resulting agreement from collateral attack by people who were not parties to the negotiations. Moreover, few would be willing to negotiate if the ultimate agreement would be disregarded by an organization essential for its implementation.

### 10. Review of Negotiation Principles

The following negotiation principles are indicators of the situations in which negotiation is likely to be an appropriate tool for developing a regulation. Regulatory negotiation is more likely to be successful when no single party can dictate the results without incurring an unacceptable sanction from the other parties.[278] Only a limited number of parties directly interested in the outcome of the regulation should participate in negotiations,[279] and the issues involved in the negotiation should be relatively well-developed and ripe for decision.[280] Moreover, it must be clear to everyone that some form of regulation will be issued in the reasonably near future.[281] The parties must believe that they can each win through negotiation.[282] Issues should not involve fundamental value choices; rather, the parties should be guided by existing criteria reasonably acceptable to the parties.[283] Finally, the parties must have a reasonable expectation that the agency will use the fruits of their labor as the basis of public policy; otherwise, they may view the negotiations as a waste of time.[284]

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[275] For an example of a negotiated agreement on research and its potential, see *infra* notes 499-500 and accompanying text (describing Mediation Agreement between Homestake Mining Company and conservationists, including agreement to undertake negotiation research).

[276] *See* Cormick Interview, *supra* note 167 (resolution of dispute over survival of eel grass to depend on outcome of mutually agreed on research).

[277] *See infra* note 547 and accompanying text (discussing hesitancy of parties to air differences fully when agreement overturned).

[278] *See supra* notes 251-56 and accompanying text (discussing situations in which power unbalanced and dominant party unwilling to negotiate because it expects to vindicate its position in another forum).

We do not yet have enough empirical experience to predict with certainty whether the negotiations will be successful.[285] The suggested criteria have been met in most of the successful negotiations involving public policy questions, such as the settlement of lawsuits challenging rules and the environmental negotiations discussed above. Thus, these criteria represent a reasonable first cut.

### B. THE APPROPRIATE PARTICIPANTS

If regulatory negotiation is to be successful, the parties must participate directly in the give and take. The threshold determination, therefore, is to identify the parties entitled to participate. Certainly, any interest that would be substantially or materially affected by the regulation should be represented.[286]

In the analogous situation of writing voluntary standards, some organizations define categories of interests that are entitled to participate in the development of the standard. For example, they require that consumers, users, and producers be represented on the committee drafting the standard.[287] Some have argued that this approach is insensitive to the particular standards under consideration[288] and that it is illusory even to attempt to identify *all* interests that might be affected.[289] As Robert Dixon observes, what is essential is to include sufficiently diverse interests to ensure that the critical issues are raised[290] and to provide *all* interests with an opportunity to make their views known.

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[279] *See supra* notes 257-58 and accompanying text (discussing inappropriateness of negotiation if it requires more than 15 parties).

[280] *See supra* notes 259-60 and accompanying text (discussing prematurity of negotiation if parties still jockeying for position).

[281] *See supra* notes 261-63 and accompanying text (describing difficulty in negotiations if two or more parties benefit from procrastination).

[282] *See supra* notes 264-68 (discussing hesitancy of parties to engage in negotiations unless parties have opportunity for gain).

[283] *See supra* notes 269-73 and accompanying text (discussing probability of unsuccessful negotiation when parties' fundamental values differ).

[284] *See supra* text accompanying note 277 (discussing improbability of parties' participation if agreement not implemented).

[285] *See* Susskind & Weinstein, *supra* note 92, at 356 (experience inadequate to develop set of criteria for environmental negotiations).

[286] Murray Weidenbaum, formerly Chairman of the Council of Economic Advisers, reportedly quipped: "What scares me is that when Big Business, Big Government, and Big Labor get together, they lean on the little consumer." *Slow Rebound from Recession*, TIME, Sept. 29, 1980, at 56, 58. This statement is more an indication that not all the appropriate interests were represented in reaching an agreement than an indication that the process of reaching consensus is an inappropriate way of making policy decisions. If negotiation is to work, care must be taken to ensure that the interests significantly affected are represented, lest the process degenerate into a sham.

[287] P. HARTER, *supra* note 178, at 131 n.175 (discussing classifications of interests for Voluntary Product Standards of National Bureau of Standards).

[288] *Id.*

[289] The Administrative Conference of the United States has recognized the difficulty in ascertaining representatives of affected interests: "The Conference is aware that the concept of representing

The determination of which interests have a sufficient nexus with the regulation to merit participation must be made on an ad hoc basis, rather than by development of an abstract categorization of interests.[291] Careful judgment must be exercised to determine which interests are so central that the regulation could not be developed without their participation and which interests are so remotely affected that their participation should be limited to written comments or other limited methods.[292] Agencies and courts regularly make similar judgments.[293] The principles developed in those contexts can be adapted and applied to the negotiation of rules. In addition, the principles that have evolved in the voluntary standards area can be used. The more immediate method of determining interested parties would be to have the parties themselves make the decisions[294] and to reserve the principles for resolution of controversies.[295]

### 1. Change in Interests

The issues involved in a negotiation may either expand or contract as work progresses and may vary depending on the stage of development. Thus, the interests represented may change over the life of the negotiations. When an issue is resolved, an interest may be dropped from negotiations or when a new issue arises, new interests may desire to participate. Moreover, the individuals who actually participate may vary depending on the issues. For example, fac-

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identified 'interests' in private standards developing organizations is a complex one, involving considerations such as what may be identifiable as an interest, its relevancy, its internal homogeneity, its capacity to be represented by knowledgeable spokesmen, and its political strength." Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulation, 1 C.F.R. § 305.78-4 (1981). Professor Boyer gives the example of ascertaining representatives of affected interests in the development of regulations limiting water pollution in a particular stream. Boyer, *supra* note 30, at 118. Interests that might be affected include the profit interest of management and stockholders; health, employment, and taxation interests of the local population; recreational, scenic, and ecological interests of those who live in the watershed to the region and of the country as a whole; the interest of consumers in lower prices; the interest of consumers in replacing the goods and services produced in the area; and the general interest of the American people in increasing gross national product, fostering competition, and maintaining balance of payments. *Id.* Although each of these groups has some interest in the outcome, clearly some groups are affected more immediately than others. It should not be difficult for each group to rank its interests according to its stake in the outcome for purposes of determining whether it would be appropriate for that interest to be included in the negotiations.

[290] DIXON, STANDARDS DEVELOPED IN THE PRIVATE SECTOR: THOUGHTS ON INTEREST REPRESENTATION AND PROCEDURAL FAIRNESS 53 (National Fire Protection Ass'n 1978).

[291] An example of a sufficient nexus would be the interest of the Antitrust Division of the Department of Justice in negotiations for a proposed regulation with potentially anti-competitive effects.

[292] An interest may be remotely affected but still be represented to a very real degree by a party who is more centrally affected and who is a participant in the discussions. That party could be charged with keeping the fringe elements closest to it informed of developments and carrying their concerns to the deliberations.

[293] *See infra* text accompanying notes 556-61 (describing judicial review of challenges to negotiated rules).

[294] *See infra* text accompanying note 371 (discussing use of preliminary inquiry to discover interested parties).

[295] *See infra* notes 434-37 and accompanying text (describing potential method of determining whether a particular interest should be included in negotiations); notes 556-61 and accompanying text (detailing judicial standard for determining standing in challenges to rules).

tual matters may require technical officials, whereas policy questions may require executive personnel.

### 2. Who the Representatives Should Be

Identifying the appropriate interests to be represented in the negotiation is only the first step in getting to the negotiating table. The next step is finding the individuals who actually will represent the respective interests. Although the interested party usually will select the representative, some discussion about who those representatives are likely to be is merited. Trade associations often represent industry, although the actual individual representative may be a corporate official from an association member. At first glance it may seem unlikely that companies would agree to have a trade association or other individuals represent the numerous members of the industry. Today, however, most companies participate in rulemaking proceedings through trade associations rather than individual corporate representation.[296] In some instances, of course, an industry or other interest group may not have a common, unified interest. In such a case more than one representative would be appropriate.

The regulation in question also may affect broad, general interests, such as consumers.[297] Thus, the group affected may be too diverse or each individual may be affected so slightly that no individual has any incentive to incur the cost and trouble of representing the class.[298] In such a case a division of the agency issuing the regulation may act as a surrogate for that interest.[299] More frequently, however, there are active, organized groups that endorse the various values and could represent groups with similar values in the negotiations.

To be an effective representative, the individual must have sufficient stature with the constituency he represents to adapt to changing situations in the negotiations and to bargain accordingly while retaining the confidence of his constituency.[300] The representative therefore must be a leader who cannot afford to be wrong too often, even though he lacks the authority to bind the constituency. Thus, a vice president of a represented company would be an appropriate person to head the negotiating delegation. Although a vice president is in a position to know the policies of the company and to predict its reactions, he cannot bind the company to a major agreement because only the president or board of directors have that authority. Further, the vice president cannot afford to be wrong too often in making major agreements because he might lose his prominent position. He is also in direct communication with the various parts of his constituency and can draw on them as required during the negotiation process.[301] Similarly, in less hierarchical groups, such as environmental organizations or trade associations, a person of senior leadership status would fulfill the same functions as the corporate vice president.[302]

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[296] It appears to be customary for the association members to negotiate among themselves to develop a position on a proposed regulation. The trade association then represents that position in the ensuing rulemaking proceedings. The same role is envisioned here.

[297] For example, virtually any rule issued by the Consumer Product Safety Commission and many issued by the Department of Agriculture or the Food and Drug Administration concerning the labeling of foods affect consumer interests.

[298] *See* THE POLITICS OF REGULATION 367-70 (J. Wilson ed. 1980) (describing political participation based on dispersion of costs and benefits).

[299] Dean Morgan proposed that Commission staff should act as a surrogate for interests of parties not part of the formal proceeding. Morgan, *supra* note 24, at 73.

[300] *Regulatory Negotiation Hearings*, *supra* note 221, at 26 (statement of Francis X. Murray).

A benefit of the negotiation process is the ability to identify the data required for an intelligent decision and to progress from that data to identification and resolution of the major issues. This sequence requires that the parties weigh the value of the issues to permit trade offs in reaching a mutually acceptable agreement. To be effective, the representative must be able to make decisions in the changing circumstances of the negotiations subject to subsequent ratification by the representative's constituents. Thus, the representatives should be principals of their organizations with decisionmaking authority rather than intermediaries.[303] For example, in assembling the participants in the National Coal Policy Project, some corporate officers that deal with the government thought that they should represent their companies because the negotiations concerned public policy. Other participants observed that substantive trade offs were necessary for the group to be successful. Because the corporate representatives dealing with government lacked that substantive expertise, other people in the company with line authority would be more appropriate representatives.[304]

### 3. Financing the Enterprise

Because the political legitimacy of a negotiated rule rests largely on the concurrence of the significant affected interests, actual participation by those interests is essential. Some interests, however, may have difficulty participating because of a general lack of funds. Others may have difficulty financing participation because they are involved in many activities and, therefore, their resources are spread thin. Such groups currently may participate in the rulemaking process by filing comments, but may not engage in extensive research or prolonged dialogue during the rulemaking process.[305] Their power may rest in their political clout, in the fact that they are a significant constituency of the agency, or in the threat of an appeal challenging a rule. Such a group may view regulatory negotiation as a less favorable alternative than notice and comment rulemaking simply because it would require the presence of its representative at the negotiating table over a period of time. To such interests, expenses of negotiation may be greater than those of the current rulemaking proceeding. Therefore, it may be essential to defray some expenses of such an organization if it is to participate.[306]

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[301] To a large extent, each interest would be represented by a team rather than by a single individual. Whereas one or a few individuals would be designated to participate in face to face negotiations, others would provide technical support. Indeed, different negotiators might participate when different issues are negotiated. For example, in the National Coal Policy Project, different individuals represented the respective constituencies in the various task forces. NCPP SUMMARY, *supra* note 206, at 4, 55. The National Coal Policy Project emphasizes, however, that each person participated as an *individual* and not as a representative of any organization. *Id.*

[302] *See* Cormick, *supra* note 247, at 28 (describing need for parties with sufficient power to commit themselves as prerequisite for participation in negotiation). John Dunlop has eloquently stated that any negotiated agreement actually involves one more agreement than the number of parties represented: the final agreement plus an agreement internal to each coalition. Each coalition, allied for purposes of the negotiations, will have differing priorities and reactions to the proposals of the other parties. Initial positions are usually assembled into a package that reflects the multiple goals of the constituency, but before a final agreement among the parties can be reached the internal differences must be reconciled and a consensus reached. J. Dunlop, The Negotiations Alternative to Markets and Regulation 10-13 (Aug 29, 1979) (unpublished manuscript). Bridging the diverse interests and communicating the evolution of discussions clearly calls for someone in a leadership position.

[303] *See supra* notes 118-26 and accompanying text (describing problems with adversarial process that result from use of intermediaries). One of the primary reasons negotiations for the location of a power plant next to an Indian reservation were unsuccessful was that the intermediaries involved were unable to deviate from the rigid instructions provided by their constituents. Hence, they could not identify and rank true interests, as required by the give and take of negotiations. When the principals themselves became involved, however, the parties reached a mutually acceptable agreement. Another significant factor, however, was the rigid format imposed on the negotiators by the agency in the first instance, and the hospitable forum available in the second. T. Sullivan, *supra* note 229, at 51-61 (analyzing federally mandated negotiation versus local resolution of problem).

[304] Murray Interview, *supra* note 206.

Funding participation in the rulemaking process recently has been much debated[307] and is a volatile political issue.[308] Several points are uniquely applicable to the regulatory negotiation process, however. First, if the regulatory negotiation process is successful, it will significantly reduce the agency's expense in developing a rule because the need for elaborate factual research and the defensive work that goes into issuing a final regulation would be reduced. Negotiations also should reduce expensive judicial challenges to rules. If an organization's participation is essential to the negotiation, defraying its out of pocket expenses could be viewed as an investment resulting in a net savings of government resources. Indeed, one experienced mediator estimates that a relatively complex rule could be negotiated for a fraction of the current cost to some parties.[309] Second, because some organizations view their power as stemming from their underdog position, such organizations would be unwilling to accept full funding despite their financial need. Such a group might feel that its independence would be compromised if it received government funds because the payments could be perceived as a source of revenue for the organization.[310]

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[305] *See* Boyer, *Funding Public Participation in Agency Proceedings: The Federal Trade Commission Experience*, 70 GEO. L.J. 51, 138-39 (1981) (discussing range of contributions of public interest groups participating in FTC rulemakings).

[306] Professor Stewart has argued that to provide an incentive to participate in good faith in a negotiation/consensus process, advocacy groups should be compensated "for the relaxation of procedural formalities and to equip them to participate effectively in informal processes." Stewart, *supra* note 112, at 1347.

[307] *See generally* PUBLIC PARTICIPATION, *supra* note 25, at 91-128 (overview of agency policies regarding financial assistance for participation in regulatory proceeding); Boyer, *supra* note 305 (evaluating criticisms that FTC funding of public participation expensive, one-sided).

[308] *See* Pacific Legal Found. v. Goyan, 664 F.2d 1221, 1227 (4th Cir. 1981) (holding that agency does not have inherent authority to fund public participation in a proceeding; funded participation must be expressly authorized). A proposed version of § 553(d)(5) of the APA, as passed by the Senate, provides: "Nothing in this section authorizes the use of appropriated funds availaible to any agency to pay the attorney's fees or other expenses of persons participating or intervening in agency proceedings." S. 1080, 97th Cong., 1st Sess., § 3, 128 CONG. REC. S2,713-14 (daily ed. Mar. 24, 1982).

[309] Cormick Interview, *supra* note 167. This estimate is corroborated by the relatively low out-of-pocket expenses for the National Coal Policy Project. *See Regulatory Negotiation Hearings*, *supra* note 221, at 2 (Statement of Senator Gaylord Nelson) (cost of negotiations minimal; Coal Project cost only $400,000 over two years).

[310] One of the main complaints about providing public funds to participate in rulemaking proceedings is that individuals or groups claim to advocate an interest and thus receive funding, although there are few indicia that they speak for a constituency or that their reasons for participating go beyond obtaining a means of self support. The ACUS has addressed these concerns and has recommended that the funding authority consider "whether the applicant receives contributions from members or constitu-

The Environmental Caucus of the National Coal Policy Project was financed in part by grants from foundations. A rigorous accounting was made to ensure that no corporate funds were used for funding the caucus because it could be argued that such funding would compromise the independence of the environmental groups.[311] During the initial public meeting, the very first question posed was whether the environmental groups had been paid by corporations and if so, whether they had sold out.[312] The accounting unequivocally put that question to rest and it did not arise again.[313] In another environmental negotiation, although a company offered to fund certain research, the environmentalists declined the offer and agreed on joint funding so that their independence would not be viewed as compromised.[314] The lesson is that whenever funding is provided, it could appear that the recipient's independence has been compromised or that the funded individual is not truly a representative of a broad-based interest. Thus, if the funding is provided, it should be administered by someone independent of the regulatory authority that will issue the ultimate regulation, or it should reimburse only expenses.

A regulatory negotiation group may require a staff, a mediator,[315] or personnel to conduct research, to compile bibliographies, or to draft initial documents for the group to review. The staff could consist of agency personnel, although a staff loyal to the agency as opposed to the negotiating group as a whole could present difficulties. Alternatively, the staff could be hired for the specific purpose of serving the group. These expenses logically should be borne by the agency because in the absence of a negotiations process, the agency would have had to use its staff to develop the regulation. Moreover, use of a staff for the negotiating group could be viewed as analogous to staff provided to an advisory committee, which agencies fund.

### C. THE AGENCY AS PARTICIPANT

The agency is indisputably a party in interest and, under the analysis above, would be eligible for participation in negotiations.[316] Thus, the question is,

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ents, whether the applicant has a record of advocating similar positions with apparent member or constituent approval and whether the applicant advises its members or constituents of the position it is taking or has taken in the proceeding." Administration Conference of United States Recommendation 79-5, § (1)(g), 1 C.F.R. § 305.79-5(1)(g) (1981).

[311] Murray Interview, *supra* note 206.

[312] *Id.*

[313] *Id.*

[314] Cormick Interview, *supra* note 167.

[315] *See infra* notes 425-32 and accompanying text (describing possible benefits of mediator in regulatory negotiation).

[316] The "interest" the agency represents is necessarily a little nebulous because, unlike the other parties, the agency would not attempt to maximize its goals (except, perhaps, in ensuring ease of administration). Rather, the agency would seek to further its perception of the "public interest," as defined by its organic statute, its existing policies, and the milieu in which it operates. Thus, the agency representatives would attempt to develop a reasonable regulatory response to the problem, based on criteria similar to those that would be used if the agency itself were developing the regulation. In traditional rulemaking, the agency must anticipate the reactions of its constituencies and take appropriate action. In the negotiation context, however, because the interests of the agency's constituencies would be presented directly, the agency would be free to concentrate more directly on its own position. Under traditional rulemaking and negotiation the agency would develop its position by acting like the umpire assessing competing claims of the parties concerning the facts and policies involved in the regulation. *See supra* notes 73-75, 87-88 and accompanying text (currently agencies act as umpires in rulemaking

should the agency participate in the negotiations?[317] Although this issue has generated considerable discussion over the years with respect to agency participation in the development of voluntary standards, no clear consensus has emerged.[318] Agency participation can be viewed as inconsistent with the agency's role as the sovereign decisionmaker because participation may cloud its ability to determine independently what is the best regulation. Despite such possibility, objective analysis indicates that the agency may have a real and significant incentive to participate fully.

### 1. Countervailing Power

In many cases, the agency, like any other organization lacks the power to control the outcome of the rulemaking process. Its decisions are limited by the record developed during the proceeding and are subject to review by the White House, Congress, and the courts.[319] A powerful organization may be able to check the agency's ability to develop a regulation that the agency believes to be appropriate and justified by the record. Even if the agency is able to issue a regulation despite a powerful interest, the process may take a very long time and consume great resources—both monetary and political. Because the outcome of judicial review is rarely predictable, the agency cannot be confident that its views, as embodied in the regulation, will prevail. Indeed, the courts reverse agencies with some frequency and agencies take great defensive measures to prevail upon judicial review.

The traditional inability of the agency to control the outcome has been heightened by the advent of executive branch review. The Office of Management and Budget (OMB) reviews regulations to ensure that the benefits justify the costs and that a complete record exists.[320] Moreover, the OMB has made it clear that it is receptive to the views of outside parties on regulations, provided that the parties submitting also have submitted their views to the issuing agency.[321] These review mechanisms necessarily broaden the perspective of an

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process). An agency's general orientation, function, motivation, and ultimate rule would be the same in both traditional rulemaking and negotiation. In sum, negotiating is an alternative means to the end of issuing a regulation, not a fundamental alteration of the concept of the agency.

[317] For example, two models of agency involvement have been proposed: the "agency oversight model" and the "agency participation model." Note, *supra* note 96, at 1875.

[318] *Compare* OMB Circular No. 119 "Federal Participation in the Development and Use of Voluntary Standards; Invitation for Public Comment," 47 Fed. Reg. 16,919, 16,920-21 (1982) (OMB statement that agency participation in development of voluntary standards intended to eliminate need for Government standards) *with* Administrative Conference of United States Recommendation 78-4(1)(a), 1 C.F.R. § 305.78-4(1)(a) (1981) (ACUS recommendation that agency employees should serve on voluntary standards committees in health and safety area without power to bind agency) *and* Employee Membership and Participation in Voluntary Standards Organizations, 16 C.F.R. § 1031.5(f) (1980) (CPSC Product Safety Commission criteria for participation limit Commission employee status to advisory nonvoting membership).

[319] *See supra* notes 77-79 and accompanying text (describing how parties can control agency decision through control over record).

[320] Exec. Order No. 12,291, 46 Fed. Reg. 13,193-94 (1981). OMB has required agencies to conduct additional work or to reconsider draft final regulations that have been submitted to it for review. *See The Administration: Settling In*, REGULATORY EYE, May, 1981, at 5 (describing regulations returned to agencies because of cost, policy, and analysis problems).

[321] Memorandum from David A. Stockman to Heads of Executive Departments and Agencies, *Certain Communications Pursuant to Executive Order 12,291, "Federal Regulation"* (June 13, 1981) (copy on file at *Georgetown Law Journal*).

agency beyond the narrow goal of achieving a parochial interest. They also diminish the agency's sovereignty and power because the agency must deal with outside interests. Thus, in many rulemaking proceedings, the agency's unilateral power is subject to checks similar to those imposed on private interests. Agency participation in negotiations is therefore appropriate.

### 2. Resources

Faced with developing a regulation from scratch, an agency first may have to amass a large scientific and technical basis for the regulation. This process can be both time consuming and enormously expensive. Although the agency may believe that the data are unnecessary for reaching a determination, it nonetheless may develop the data in anticipation of future attacks by parties seeking to participate in the ultimate decision. The agency, therefore, is compelled to conduct extensive scientific and technical research. If the parties participated directly, however, they might agree that some data is unnecessary and narrow the data base. Moreover, in face to face negotiations the parties may be more willing to furnish relevant data, which often is inaccessible to the agency, if the donor can control its use.[322] Thus, the agency may be able to conserve its resources by negotiating directly with the affected interests.

### 3. Timeliness

Regulations take an enormously long time to become effective. Such delay may occur because regulations have a significant impact on the economy and also require development of factual bases.[323] Much of the time involved surely must be attributable to the wrangling and disputes among the parties through their respective exercises of power in the adversarial process. Regulatory negotiation with agency participation, properly conducted, could provide a forum for more direct reconciliation of those disputes in a less time consuming fashion.

### 4. The Advantages of Agency Participation

Agency participation in a negotiated solution to a regulatory problem may prove beneficial to the agency for several reasons. It can avoid the political infighting, which is a form of exercise of power among the interest groups. It can tap the expertise and resources in the private sector. It can reduce the need for development of vast factual material that may not be necessary for informed decisions. It can facilitate reaching a final decision in a shorter period of time. All of these attractive benefits assume, however, that the process would be effective and not simply add another layer of review to the hybrid rulemaking proceeding. Experience indicates that the process will not be completely successful unless the agency participates fully. Negotiations are less likely to result in a proposed regulation if the parties other than the agency develop a recommendation which is then tendered to the agency for its review and consideration.[324]

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[322] *See supra* note 106 and accompanying text (discussing reluctance of parties to provide data under current adversarial process).

[323] *See* Morgan, *supra* note 24, at 24-26 (discussing causes of delay in agency ratemaking).

### 5. The Difficulties of Agency Nonparticipation

Several difficulties result when the agency fails to participate directly. First, the parties lack guidance concerning the results that would be acceptable to the agency. This problem is not merely the result of the agency's status as a government entity. Rather, the problem occurs whenever a major interest with veto power over implementation of the agreement fails to participate in the formulation of the agreement. One frequently cited reason for failure to establish or to continue negotiations is that a particular party with the power to frustrate implementation refuses to participate.[325] Others may not be willing to invest the resources necessary for reaching agreement if its implementation is uncertain. Even if negotiations do move forward, the parties must anticipate the position of the missing party and, thus, will not be in a maximum position to give and take within the range of acceptable alternatives.

A related problem occurs when agency participation is limited to monitoring the proceeding and specifying acceptable outcomes; such actions may be viewed as edicts or directives to reach particular results. Such a role is inconsistent with the concept of negotiations, in which the parties together define issues and agree on acceptable selections. Agency nonparticipation, therefore, adversely affects the definition of the boundaries of the discussions, because the parties are either insufficiently aware of the boundaries or the boundaries are too rigid.

Moreover, a recommendation developed without agency participation runs into the "not invented here" syndrome when submitted to the agency for review and consideration. The agency's staff has an incentive to find fault with the recommendation and to second guess the negotiators' judgments because it may perceive a need to prove its merit and demonstrate its expertise. It is simply human nature to demonstrate one's worth when reviewing a document submitted for consideration; by pointing out deficiencies, real or imagined, one appears to make a contribution. Alternatively, the agency may not have a position on a negotiated agreement and may have to conduct research to develop one. Such repetition reduces many of the benefits of negotiated regulation.

Experiences in regulatory and nonregulatory negotiations demonstrate the reality of these difficulties. Congress has experimented by having individuals in the private sector develop a proposed regulation. One such program was a disastrous failure.[326] If regulatory negotiation is to be successful, the lessons of that failure must be borne in mind.

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[324] Even if the process does not lead to a proposed regulation, it still can have important beneficial effects. *See infra* text accompanying note 594 (describing enhanced ability of parties to resolve disputes because of working relationship developed in negotiations).

[325] Gerald Cormick lists the following as the first inquiry in deciding whether negotiation is an appropriate way of settling environmental disputes: "Are *all* parties who have a stake in the outcome or the ability to influence implementation involved?" Cormick, *supra* note 247, at 28 (emphasis added). It is similarly first on Susskind's list of steps necessary for successful mediation. Susskind, *supra* note 83, at 14.

[326] *See infra* notes 327-48 and accompanying text (discussing CPSC offeror process).

The Consumer Product Safety Act[327] authorizes the Consumer Product Safety Commission (CPSC) to "promulgate consumer product safety standards."[328] A proceeding for the development of a safety standard begins with the publication in the *Federal Register* of a notice identifying the products and the risk of injury addressed by the rule, together with a summary of each regulatory alternative under consideration by the CPSC.[329] The notice also includes information concerning any existing standard known to the CPSC that is relevant to the proceeding.[330] Prior to the Act's recent revision,[331] the notice also could include "an invitation for any person (other than the Commission). . . to offer to develop the proposed Consumer Product Safety standard"[332] The Act directed the Commission to permit one of the offerors to develop a proposed standard submitted pursuant to the invitation "if it determines that the offeror is technically competent, is likely to develop an appropriate standard within the period specified in the invitation . . . and will comply with the regulations of the Commission."[333] Under this process, the Commission invited either existing organizations or ad hoc groups brought together for that specific purpose to develop a proposed standard. The statute further authorized the CPSC to contribute to the offeror's cost in developing a proposed standard.[334] Interestingly, very little legislative history exists to explain why Congress chose this approach.[335]

By all accounts the offeror process did not work well[336] and the CPSC was recently directed to develop product safety standards on its own without going through the offeror process.[337] Under the offeror process standards were notoriously slow in developing,[338] and the standards sometimes lacked adequate

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327. 15 U.S.C. §§ 2051-2081 (1976), *amended by* Pub. L. No. 97-35, 95 Stat. 703 (1981) (codified at 15 U.S.C.A. § 2058(a) (West 1982)).

328. *Id.* § 2056(a)(1).

329. 15 U.S.C.A. § 2058(a) (West 1982).

330. 15 U.S.C.A. § 2058(a)(3) (West 1982).

331. Omnibus Budget Reconciliation Act, Pub. L. No. 97-35, 95 Stat. 703 (1981).

332. 15 U.S.C. § 2056(b)(1)(D)(ii)(I) (Supp. IV 1980), *repealed by* Omnibus Reconciliation Act, Pub. L. No. 97-35, 95 Stat. 703 (1981).

333. *Id.* § 2056(d)(1).

334. *Id.* § 2056(d)(2). At times, the CPSC also required that representatives of certain interests be members of the offeror group. *See* P. Harter, *supra* note 178, at 1338 n.178 (describing CPSC consumer representatives in voluntary standards development). Both the statute and the CPSC's regulations required that the offeror provide for "notice and opportunity by interested persons (including representatives of consumers and consumer organizations) to participate in the development of such standards." 15 U.S.C. § 2056(d)(3)(B) (1976); *see* 16 C.F.R. § 1105.6(a)(1) (1980) (requires offerors to give notice to interested persons of opportunity to participate in standard development).

335. For an analysis of the meaning and history of the offeror provision, see Scalia & Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 U.C.L.A. L. Rev. 899, 906-16 (1973). They explain that the offeror process may "constitute anything from the very core of the rulemaking process to a set of troublesome but inconsequential preliminaries." *Id.* at 908.

336. For example, the House Interstate and Foreign Commerce Committee explained: "The committee has long been concerned about the length of time it takes the CPSC to develop safety standards under the offeror process in Section 7 of the Act. Of equal concern to the Committee has been the quality of the standards being produced." H.R. Rep. No. 1164, 95th Cong., 2d Sess. 5, *reprinted in* 1978 U.S. Code Cong. & Ad. News 9434, 9435; *see also* T. Schwartz, The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade (Nov. 1982) (report to ACUS discussing many problems with offeror process, including length of time required to develop regulation and lack of definition of role of offeror).

337. Omnibus Budget Reconciliation Act, Pub. L. No. 97-35, 95 Stat. 703 (1981) (offeror provision repealed).

338. *See supra* note 336 (describing offeror process as lengthy).

supporting data.[339] Offerors and the CPSC staff became embroiled in great struggles and an offeror's recommendations frequently were revised substantially before being used as a basis for a proposed standard.[340]

The CPSC began its use of the offeror process by creating distance between itself and the offeror on the grounds that it did not want to intrude into the deliberations of the private group.[341] This approach left offerors without substantial guidance concerning what the agency would deem acceptable results or how to write a standard.[342] Moreover, offerors could not tap the expertise and data sources of the agency.

Several offerors complained about the lack of guidance,[343] and a former chairman of the CPSC acknowledged the absence of guidance as a major problem.[344] As a result, the CPSC began providing directions for offerors, but tensions continued between the offerors and the Commission. In a joint project between industry and the agency to develop voluntary standards, the Commission accused an offeror of being comprised of "macho manufacturers" who stonewalled the agency.[345] The offeror responded that the problem lay in "the ineptitude, bias and mismanagement casually dispensed" by the agency's staff.[346] Although some offerors argued that the CPSC second guessed and nitpicked the result, on several occasions the CPSC seemed to believe that the proposals resulting from the offeror process were inadequate because they were generally too stringent or imposed requirements based on inadequate data.[347]

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[339] *See e.g.,* D.D. Bean & Sons v. Consumer Product Safety Comm'n, 574 F.2d 643, 652 (1st Cir. 1978) (finding complete absence of evidence in record on matchhead fragmentation); Aqua Slide 'N' Dive v. Consumer Product Safety Comm'n, 569 F.2d 831, 844 (5th Cir. 1978) (holding that CPSC failed to produce substantial evidence to support warning sign and ladder chain requirements); H. R. Rep. No. 1164, 95th Cong., 2d Sess. 6, *reprinted in* 1978 U.S. Code Cong. & Ad. News 9434, 9436 (citing provisions of recommended standards lacking supporting technical rationale).

[340] The House Committee stated:

> The Consumer Product Safety Commission has generally given offerors great latitude to make independent judgments regarding the levels of safety required to address an unreasonable risk. The CPSC, however, has often disagreed with those judgments as incorporated in the offeror's recommended standard. In reviewing a recommended standard, the CPSC has often rewritten the offeror's work product, substituting its judgment on the levels of safety required for those of the offeror.
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> This *modus operandi* has severely undercut the effectiveness of the offeror process by reducing the meaningfulness of the industry and consumer participation.

H.R. Rep. No. 1164, 95th Cong., 2d Sess. 6, *reprinted in* 1978 U.S. Code Cong. & Ad. News 9434, 9435.

[341] One participant in an early offeror proceeding described the CPSC's attitude toward the participants as "Delphic." Letter from Peter H. Schuck to Philip J. Harter (Dec. 4, 1981) (discussing negotiations in rulemaking) [hereinafter Schuck letter] (copy on file at *Georgetown Law Journal*).

[342] The House Committee criticized the CPSC for directing offerors to address a broad range of hazards regardless of the data or lack thereof on the respective risks involved in such hazards. Thus, the CPSC required the offerors to consider unsolvable hazards; hazards for which there was little or no data to establish their existence; hazards over which the CPSC's jurisdiction appears highly tenuous. H.R. Rep. No. 1164, 95th Cong., 2d Sess. 9, *reprinted in* 1978 U. S. Code Cong. & Ad. News 9434, 9438.

[343] *See* Hamilton, *supra* note 184, at 1410-12 (American Society for Testing and Materials and Consumers Union so complained).

[344] *Consumer Product Safety Commission—Oversight: Hearings on the Degree to which the Consumer Product Safety Commission is Fulfilling Its Mandate to Protect Consumers from Unreasonable Risks of Death, Injury or Serious or Frequent Illness Associated with the Use or Exposure to Consumer Products Before the Subcomm. on Oversight and Investigation, and Subcomm. on Consumer Product and Finance of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 1st Sess. 359 (1977) (testimony of John Byington, Chairman of CPSC).

[345] *What Can Sway CPSC Is Shown in King's Views*, Product Safety Letter, at 3 (Jan. 26, 1981).

[346] *Chain Saw Makers Blast CPSC*, Product Safety Letter, at 4 (Feb. 9, 1981).

These failures stem in part from the lack of direct participation by a responsible agency official in the development of the proposed standard. Because the CPSC did not participate, the offerors had to guess the agency's positions and were unable to engage in the give and take of a negotiation process. Because the offerors lacked guidance and data, they tended to develop far more elaborate and complicated standards than they would have if the agency had been present. The agency then had to develop a position based on new information. This duplicative process obviously took time and resources. Finally, and perhaps most important, some have alleged that the offerors were far too responsive to some of the interests, to the exclusion of others.[348] The lesson seems to be that all interests significantly affected should be at the table, including the agency.

### 6. The Disadvantages of Agency Participation

Agency participation in regulatory negotiation raises problems of its own, some practical and some doctrinal. Many of these concerns, however, can be met. On the practical side, the fact that the agency will make the decision if negotiations break down can cause the parties to view the agency representative as a "special" interest and to accord it an unusual status. Some parties may continue to posture, to advocate extreme positions, to denounce the opposition as unworthy, and generally to preserve their positions for an ensuing adversarial contest.

A second concern arising from agency participation is that if negotiations break down and an agency decision follows, the agency may misuse the concessions and compromises made during the negotiations, as well as the data submitted during the process. A party may fear that once it deviates from its initial, adversarial position, recouping its position with the agency would be impossible if discussions break down. Thus, agency participation may cause the parties to maintain an inflexible approach, and the benefits of the negotiation process might be lost. These problems are not unlike those that arise in *any* negotiation,[349] however, and procedural devices can, in large measure, remedy them.[350]

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[347] *Cf. supra* note 340 (discussing problems with offeror process from congressional perspective).

[348] The House Interstate and Foreign Commerce Committee stated:

> Unfortunately, the CPSC's efforts to assure that the proposed safety standard would be adequate have often been made without the advice or expertise of interested consumer or industry groups. The result has been poor quality standards, inadequately technical rationales to support the standard when challenged in court, and inefficient utilization of all parties' resources.

H.R. REP. NO. 1164, 95th Cong., 2d Sess. 6-7, *reprinted in* 1978 U.S. CODE, CONG. & AD. NEWS 9434, 9436.

[349] The agency may appear to have ultimate decisionmaking authority because, if negotiations break down, the agency will develop the rule. Despite this possibility, this situation is not unlike many negotiations in which one party can take action subject to sanctions imposed by others. In the rulemaking context, the agency may write the rule, but private parties continue to participate in shaping the record and exerting the normal political pressures. Thus, the unilateral act of writing the rule remains subject to a form of countervailing power. This observation, however, does not remove the concern

A more troubling problem arises from the concept of the agency as sovereign. Under a view of the agency as the decisionmaker, as in the New Deal vision of the agency, it would be illegitimate for the agency to negotiate with the parties in interest. According to this view, the agency may seek widespread public participation in the rulemaking process by contacting private interests before proposing a rule and by publicizing the development of a rule to permit any interest to submit material for the agency's consideration. But the agency should not jeopardize the exercise of its neutral, detached, expert judgment with too much contact with the parties.[351]

With respect to regulatory negotiation, however, concerns about the concept of the agency as sovereign are misplaced.[352] First and foremost, the agency itself would not be bound by the position taken by its representative during negotiations, any more than any single constituency would be bound irrevocably by the position taken by its representative. Rather, the agency's senior staff would continue to review the proposal to determine whether the proposal reflected the agency's policies sufficiently to merit publication as a proposed rule.[353] The officials in the agency who have final regulatory authority would assess the proposal just as they routinely do under the current process. In traditional rulemaking, the staff develops a proposed regulation, frequently after consultation with affected interests.[354] The staff then submits it to senior officials for review and approval as a proposed regulation.[355] The process of negotiating a proposed rule, therefore, would make more explicit and efficient a process that occurs regularly in current rulemaking.

Concern also has been expressed that the participation of an agency official in the negotiations would make a sham of the subsequent notice and comment period.[356] That worry, however, is more apparent than real because under cur-

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that agency participation may cause the parties to maintain an inflexible approach. For example, in the Homestake Mine negotiation, one of the participants expressed concern that the negotiations revealed their case to the other side. Danielson Interview, *supra* note 162; Watson Interview, *supra* note 165.

[350] *See infra* notes 452-67 and accompanying text (discussing alternative solutions to problem of agency participation in negotiations).

[351] *See supra* notes 38-43 and accompanying text (describing New Deal view of agency as detached, neutral experts acting in public interest); M. WESSEL, *supra* note 80, at 174-75 (describing need for neutral detachment of conferees when seeking scientific consensus); Stewart, *supra* note 3, at 1712-16 (describing agency bias and pressures to expand traditional model to include unorganized interests).

[352] Not participating in the development of voluntary standards for a product or process subject to the agency's jurisdiction may be appropriate in those instances in which the agency is not called on to review the standard. In such a case the position taken by the agency representative could be perceived as the official agency position when in fact it reflected only the views of a staff member. *See supra* note 318 (comparing conflicting federal policies on agency participation in voluntary standards development).

[353] If a proposed rule is negotiated among the parties, it presumably would be published in the *Federal Register* as a notice of proposed rulemaking and subjected to the normal comment and agency review process. *See infra* notes 549-51 and accompanying text (describing agency review of negotiated regulation, including negotiatied rule and comment process interaction).

[354] See W. MAGAT, L. GIANESSI & W. HARRINGTON, *supra* note 174, at 2-1 to 2-28 (describing EPA's best practicable technology rulemaking process for water quality standards).

[355] *See* Pedersen, *supra* note 77, at 52-59 (describing internal rulemaking procedures at EPA).

[356] Letter from Chairman James C. Miller, III to Sen. William V. Roth, Jr. (Nov. 25, 1981) [hereinafter Miller letter] (copy on file at *Georgetown Law Journal*). The letter contained the comments of the Federal Trade Commission on agency participation proposed in The Regulatory Mediation Act of 1981. S. 1601, 97th Cong., 1st Sess., 127 CONG. REC. 123, S9328 (daily ed. Sept. 9, 1981). The Regula-

rent practice comments are received and reviewed by the staff that prepared the proposed rule and are subject to the final review of senior agency officials. That practice could continue for proposed rules developed through negotiation among the parties having a significant interest in the negotiations. Moreover, an initial proposal developed through negotiation should be more balanced and reflect more diverse views than one written by the agency after informal and sequential consultation that responds to the various political pressures.

The experience of agencies in negotiating settlements for lawsuits supports this argument. In lawsuits challenging rules agencies routinely negotiate settlements in which they agree to publish a particular notice of proposed rulemaking.[357] In these cases, senior agency officials must determine whether the agreement comports with agency policy and is within the range of acceptable regulatory alternatives. Similarly, enforcement actions are also regularly negotiated. In both situations, the agency representative negotiates subject to senior official approval; he does not act as the sovereign agency making an independent decision and holding firm.

Part of the concern about agency participation in regulatory negotiation is the fear that the negotiation decision may not be *the* one the agency would have developed independently as a regulation. Although it is unclear whether this fear is justified,[358] the question obviously is not whether the decisions are identical, but whether the decision is within the range of acceptable alternatives. As Dean Morgan noted in an earlier ACUS project addressing the related issue of settling ratemaking cases: "Ambiguity is an inherent characteristic of the ratemaking process. . . . The most that can be hoped of any process, whether formal or compromised, is that the result will fall within a range of reasonableness."[359] Further, the range of acceptable alternatives currently is defined in large part by the parties themselves. Negotiation merely gives them a direct voice and recognizes what happens in practice.[360] Thus, properly structured negotiations not only fulfill the goals of the regulatory process, they do so more directly than the current practice.[361]

The agency remains sovereign because it alone makes the final decision. To alleviate any persistent concerns, however, it can be made clear at the outset of a regulatory negotiation that the participation of the agency representative is not binding on the agency. For example, each of the parties in the Columbia

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tory Mediation Act of 1981 would reduce the adversarial nature of the regulatory process by encouraging negotiation. Chairman Miller complained that because the participation and endorsement of a senior official would make it appear that the agency is committed to the negotiated proposal, the subsequent notice and comment procedure would appear to be a sham to those who did not participate. Miller Letter, *supra*.

[357] *See supra* notes 194-99 and accompanying text (describing negotiated settlements of rule challenges).

[358] For example, some European standards for vinyl chloride were negotiated and are similar to OSHA's. *See generally* J. BADARACCO, *supra* note 93 (overview of similarities and differences in European and American business and government relationships).

[359] Morgan, *supra* note 24, at 71.

[360] *See supra* notes 87-88 and accompanying text (describing political process agencies engage in without legislative directives).

[361] This process is not dissimilar to that described in the legislative history of the APA. *See supra* note 28 (describing conferences among interested parties as potential substitutes for formal hearings).

River negotiations was a government agency.[362] After reaching a settlement acceptable to the representatives of the parties, each representative agreed to recommend approval to his respective agency and each understood that the other could not bind its agency short of that ratification. All participating agencies approved the agreement after they conducted the appropriate reviews.[363]

### 7. Appropriate Agency Representative

The agency representative, like his private sector counterparts, should be a relatively senior official. He should have the ability to assess and predict the ultimate position of his constituent, the agency. Further, the representative should be part of the substantive division of the agency that is responsible for the development of the regulation so that he can make the requisite decisions. Because the goal of the negotiations is to produce an agreement that will form the basis of a regulation issued by the agency, it is important to involve the agency's lawyers in the process. Moreover, it is critical that any legal concerns be addressed early because negotiations could be thrown off stride or discarded altogether if such questions arose late in the process. The agency negotiators should be able to tap the agency resources, including any data the agency may have collected, agency experts, and relevant staff. Thus, the negotiating team should have sufficient stature to permit it to draw on the agency's resources and coordinate its various concerns as it would if the regulation were being developed by the agency's own staff.

### 8. Summary of Agency Participation

Negotiations among the parties, with or without the agency, can expose the true interests of the respective parties. Negotiations thus narrow the range of disagreement, identify the research that needs to be conducted, and explore novel approaches to fulfilling the regulatory mandate. If the private parties themselves can reach agreements on all or even some of these topics, the agency's work will be greatly streamlined. Even if the agency does not participate, it can facilitate the negotiations process by providing guidance on the limits of available options and by supplying data and information available to the agency that may be unavailable to the private parties.[364]

It seems clear from the foregoing analysis, however, that to achieve the full benefits of regulatory negotiation, the agency should participate as a full party. Although care must be taken to avoid the problems attendant to that role, doing so will not be difficult. If the agency does not participate in the negotiations, the fruits of the process may be bland recommendations akin to those proffered by traditional advisory committees. That result, in turn, would only add another layer and more delay to the rulemaking process.

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[362] *See supra* note 232 and accompanying text (describing Columbia River environmental negotiations).

[363] Gusman Interview, *supra* note 232. Gusman served as the mediator for the negotiations.

[364] In this scenerio, the role of the agency would not be significantly different from its role in the development of voluntary standards. *See* Employee Membership and Participation in Voluntary Standards Organization, 16 C.F.R. § 1031.5(f) (1980) (describing CPSC participation in voluntary standards development); P. HARTER, *supra* note 178, at 216-35 (detailing agency actions to improve relationship between externally developed standards and government regulations).

### D. ASSEMBLING THE NEGOTIATORS

The parties are likely to view the entire negotiation process with healthy skepticism.[365] For years rules have been developed through a quasi-adversarial process in which each party views the other as an untrustworthy opponent.[366] Negotiations could be viewed as a naive, futile effort to induce the lamb to lie down with the lion.[367] The lamb is likely to believe that by negotiating it may give up power provided by another process. Therefore, it may be far more comfortable with the traditional process, in which it is protected by a shepherd.[368] If the parties are to be willing to participate, they must be shown that it is in their interest to negotiate. In addition, it is rarely clear from the outset which interests should be represented and who the representatives should be. Thus, considerable effort must be expended to establish the negotiations if the entire process is to be successful.

#### 1. Neutral Judgment

The first question is who should be responsible for empanelling the group. The parties frequently can agree among themselves who the major players are. One way of assembling the group, therefore, would be to have the parties agree upon the participants in a negotiating group. Someone, however, would have to initiate and administer even this relatively simple process. Moreover, if a regulation is to be negotiated[369] someone would have to determine whether the significant parties in interest were actually represented.[370]

A second approach, and one likely to be more common, would require some individual to conduct a discrete preliminary inquiry to discover who the interested parties are and whether sufficient common ground for reaching an agreement through negotiation exists.[371] For example, the individual might contact the line officer in an agency and ask what interests would be affected by the subject matter of the regulation and which groups would be likely to participate in the rulemaking proceeding. In addition, he would inquire about the issues likely to be involved in the proceeding. The person conducting the inquiry would then contact the individuals and organizations on that list and inquire about their views as to what the interests are, what issues are likely to be raised, and who the players should be. He also would ask what issues would be inappropriate for negotiation and whether the organization believed it could work with other parties in reaching an agreement. Thus, through such multiple iterations, the parties and the issues could be defined, both inclusively and exclusively.[372]

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[365] *See supra* text following note 173 (discussing implausibility of hot tub theory of negotiations, which characterizes negotiated solutions as those reached in an atmosphere of beguiling honesty and openness).

[366] *See supra* notes 104-27 and accompanying text (discussing criticisms of adversarial process).

[367] The phrase derives from a letter concerning regulatory negotiation from Richard M. Patterson, of Dow Chemical, to Dan Bensing, Legal Counsel, Senate Governmental Affairs Committee (June 2, 1981) (copy on file at *Georgetown Law Journal*). Mr. Patterson's letter expressed concern about some regulatory negotiation proposals that were current at that time.

[368] *See supra* notes 243-47 and accompanying text (describing sources of negotiating power, such as formal process for resolution of disputes).

[369] Even if the initial discussion does not result in a negotiated rulemaking, the concerns addressed herein would still apply. The preliminary discussion may result in a narrowing of the differences among the interests and a series of recommended regulatory actions by a group acting as an advisory committee. *See infra* text following note 416 (discussing use of advisory committee if regulatory negotiation determined inappropriate). For example, the Federal Advisory Committee Act (FACA) requires that advisory committees "be fairly balanced in terms of the points of view represented." 5 U.S.C. app. § 5(b)(2) (1976).

[370] *See infra* text accompanying notes 401-02 (describing role of convenor, including determination of feasibility of negotiation and representation of interests).

[371] Cormick Interview, *supra* note 167.

The obvious organization to conduct this inquiry, or on whose behalf the inquiry would be conducted, is the agency that ultimately will issue the regulation. The agency must be comfortable with the process by which its own regulations are developed,[373] and it might be hesitant to rely on a negotiating group assembled by someone outside its control.[374] The agency thus appears to be a logical candidate.

There are, on the other hand, significant arguments for having someone other than the agency itself assemble the group. The point of the iterative process is to make discrete, confidential inquiries about a party's interests and the issues it believes reasonably can be discussed. A party may believe that its ultimate interests lie in the political or adversarial process, and it justifiably may be reluctant to talk candidly with the agency for fear of retribution if it does not agree to participate in the negotiation. In addition, a party may believe that either proposing the negotiation process or agreeing to participate before other parties agree to do so would be an acknowledgement that it is unable to achieve its goal through the normal process; this in turn would diminish its power.[375] Thus, the preliminary inquiry into whether negotiation is feasible, which requires touching base with the various interests while narrowing the issues, must be conducted in confidence and must permit a party to say "no."[376] Otherwise, the very purpose of the discrete inquiry would not be fulfilled because the parties would not begin the negotiation process by trusting each other.

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[372] This iterative process need not take long because the goal is to spot parties and issues, not resolve them. Usually the process could be completed in a few weeks.

[373] An agency that is uncomfortable with the negotiation process might refuse to participate or, if it does participate, might find ways to sabotage the results. If such sabotage occurred, negotiation would consume resources without achieving its overall benefits. Therefore, it would be inefficient to try to *force* the agency to use a negotiation process to establish a regulation.

[374] Professor Stewart believes that an agency's reluctance to "lose control" of the rulemaking process is a major inhibition on the use of negotiation to establish regulations. Stewart, *supra* note 112, at 1346. To the extent that observation is true, and undoubtedly it is, an agency may feel doubly reluctant to participate if it cannot control the establishment of the negotiating group.

[375] *See* Eisenberg, *supra* note 127, at 672-73 (discussing willingness of parties to negotiate depending on relative bargaining powers).

[376] A party might be forced to negotiate by the prospect of embarrassment from publicity of the fact that it held up full negotiations. It would still be difficult, however, to force the party to participate in good faith if it believed the subject unsuitable for negotiations. Cormick Interview, *supra* note 167. In one environmental negotiation, a party was forced to the table by such a tactic, and the whole process angered all those involved. H. Burgess, *supra* note 250. If a party states that it believes negotiations are inappropriate and that it is unwilling to participate, someone should determine whether the party's participation is essential to the negotiation and the strength of its refusal. It may be that negotiations are appropriate and that the party ultimately would participate, despite its initial statement to the contrary.

The political legitimacy of this process depends on the participation of representatives of the interested parties as negotiators. Thus, the parties and the world at large must have confidence that negotiators are indeed representatives of the significantly affected parties.[377] Therefore, it would be inappropriate to permit any participant to be responsible for assembling the group because it might appear that one party selected interests and individuals to support its views.[378]

The agency is particularly susceptible to charges of bias. For example, one allegation against intervenor funding is that agencies have a bias toward funding those interests that support its view.[379] One regulatory agency, which wanted to draw on diverse views of experts in a particular field, asked the National Academy of Sciences to empanel a technical committee.[380] An official of the agency believed that the panel's recommendations would be given far greater credence if the panel was not under the agency's own auspices because people would believe that the participants were selected on the merits, rather than because of bias in favor of the agency.[381] The official indicated that he believed individuals with greater stature in their respective communities were willing to participate in the process precisely because they felt the neutral selection sustained the panel's legitimacy.[382] Indeed, many statutes that require an agency to consult with an advisory panel before issuing a regulation[383] also require the panel either to be appointed by or selected from nominees of the National Academy of Sciences. The obvious motivation for this trend is a desire to ensure the neutrality of the panels, and in particular, to remove the possibility that parties could allege that the agency stacked the committee to favor a point of view or to exclude some position.

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[377] Any group that negotiates a position on a regulatory matter can assist an agency by narrowing the range of alternatives that would be acceptable to the members of the group, by spotting issues that may be troublesome, and by providing a starting point for the agency's consideration of the issues. There is, of course, no requirement that any group communicating its views and positions to an agency represent a diversity of views or even more than one interest.

If, however, the group is to have any formal relationship with the agency, as is required for the negotiation of a rule, FACA requires that the membership "be fairly balanced in terms of the points of view represented." 5 U.S.C. app. § 5(b)(2) (1976). Further, neither the agency nor any particular interest should unduly influence the position of the committee as a whole. *Id.* § 5(b)(3). Moreover, it is critical that the members of a group negotiating a rule actually represent the interests involved and that no one party is in a position to pressure the membership to favor its perspective because this proposal anticipates that the product of the negotiation would be accorded significant deference. *See infra* notes 547-56 and accompanying text (describing agency and judicial review of negotiated regulations).

[378] "[T]here is a perception . . . that there is inherent, insidious bias in the panel selection process and, as a result, in the panel's studies. This view argues that the person appointing the panel, subconsciously (or perhaps consciously—it makes no difference) chooses people whom he believes will be partial to the result he favors." M. WESSEL, *supra* note 80, at 146.

[379] The Magnuson-Moss Act's expense reimbursement program may not have led to bias in agency funding. Administrative Conference of United States Recommendation 80-1, Trade Regulation Rulemaking under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 1 C.F.R. § 305.80-1 (1981). Nonetheless, recommendations were made to ensure that participants were selected to provide a diversity of views as opposed to those supporting the agency. *Id.* § 305.80-1(C). The ACUS has recommended that separate parties administer the reimbursement program and the development of staff positions for a proceeding. 1 C.F.R. § 305.79-5(1)(f) (1981).

[380] Seymour Interview, *supra* note 168.

[381] *Id.*

[382] *Id.*

[383] *See supra* note 140 (listing examples of statutes requiring agency to seek advisory committee advice).

To avoid the inevitable claims of bias and conflict, as well as the difficulty of securing the initial agreement of the parties to participate, an organization other than the agency that will ultimately issue the regulation should assemble the negotiating group, at least on a preliminary basis. The use of a neutral third party would enable the parties to express themselves with candor. In addition, a neutral third party is appropriate because many of the decisions made in the initial stage of negotiations will be of a judicial nature. Such preliminary decisions would include the identification of interests and their appropriate representation.[384] Thus, an unbiased decisionmaker of the highest probity would be required. If an organization other than the agency assembles the negotiation group, the agency would have no stake in its composition. Thus, claims of agency bias or conflict in selection of the negotiating group would be avoided.[385]

### 2. Convenor

Several existing Federal agencies could be used to perform the "convenor" function. The convenor would have responsibilities for the preliminary determination of the feasibility of negotiation, the interests to be represented, and the appropriate representatives of the interests.

The President's Task Force on Regulatory Relief is an interagency organization administered by the Office of Management and Budget (OMB) with the power to direct agencies to consider various regulatory alternatives and to coordinate agencies' approaches to regulatory questions.[386] It has become the ultimate authority in the Executive Branch's management of the regulatory process.[387] Although the Task Force could be extremely helpful in regulatory negotiations by assuring agencies of the legitimacy of the process, it is unlikely to serve as the convenor because it has no operational authority. Rather, the OMB provides staff to the Task Force.

The OMB, in addition to its general management authority and its duties under the Paperwork Reduction Act,[388] has general authority to implement President Reagan's Executive Order 12,291.[389] The Order requires the OMB to review regulations issued by the respective agencies and the regulatory impact analysis[390] prepared by the agencies for major rules.[391] The OMB attempts to ensure, at least in theory, that agencies have adequate support for the factual conclusions underlying regulations and that regulations are clearly within the agency's statutory mandate.[392] It has become the central manager of the regulatory process.[393] The OMB could make the preliminary determinations concerning regulatory negotiations as an adjunct to this regulatory management authority.

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[384] *See infra* text following note 443 (discussing judicial nature of preliminary determination of parties to negotiation).

[385] Widespread confidence in the legitimacy of the negotiating group would help ensure that the results of its negotiation are accorded greater weight and that they would not be subjected to collateral attack. Therefore, it is in the agency's interest to instill such confidence. To the extent that the use of an independent third party increases such faith, it should reduce the agency's innate resistance to the notion.

[386] Exec. Order No. 12,291, § 6, 3 C.F.R. 127, 131 (1981).

[387] *Id.*

[388] 44 U.S.C. §§ 3501-20 (Supp. IV 1980).

[389] Exec. Order No. 12,291, 3 C.F.R. 127, 131 (1981).

[390] *Id.* § 3; *see infra* notes 589-90 and accompanying text (discussing regulatory impact analysis).

[391] *Id.* at § 6, 3 C.F.R. 127, 131 (1981).

[392] *Id.* at §§ 4, 6, 3 C.F.R. 127, 130-31 (1981).

The significant drawback of this suggestion is that the White House—the Task Force and OMB—could be viewed as politically partisan and thus liable to select interests and representatives favorable to political views of the administration. Moreover, OMB's review function creates tension between the agencies and OMB that may frustrate the good working relationship necessary for such a system to work. This tension may cause the agency to use the traditional process to avoid dealing with the OMB, even if it otherwise believes negotiating would be appropriate.

Another alternative for the role of convenor would be the Federal Mediation and Conciliation Service[394] (FMCS) which, among other things, develops "the art, science, and practice of dispute resolution."[395] Until recently, the FMCS has been concerned almost exclusively with labor/management issues. Recently, however, it has undertaken a role in age discrimination cases[396] and other nonlabor fields.[397] Because FMCS has an expertise in conducting negotiations, it may be an appropriate convenor if it continues to expand its focus.

The ACUS[398] itself could function as the convenor in regulatory negotiations. Its traditional field of expertise is procedural, and it has not been partisan, either politically or with respect to an interest of a particular agency. Although ACUS is detached and neutral, each agency has a representative who is a member of the Conference.[399] Consequently, the ACUS is not an alien "black box" with which the agency might be uncomfortable working. Further, the diversity of views on the Conference, both among the respective agencies and the public members, assures its continued neutrality. Thus, the Conference would be a logical choice to perform the task of convenor.[400]

The convenor would be responsible for making the preliminary determinations of whether negotiation is a feasible way of establishing the rule, which interests should be represented, and who the representatives should be. The convenor should base these determinations primarily on agreement among the parties in interest.[401] The process used to develop the regulation must also be acceptable to them.[402] If the parties agree to develop a regulation through negotiation they could suggest a pre-formed group to the convenor. The group would then review the proposal to ensure that the proper interests are adequately represented and the issues involved are suitable for negotiation. If the convenor concurred with the participants and issue selection, it then would certify that decision to the responsible regulatory agency.

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[393] *Id.* § 4(a), 3 C.F.R. 127, 120-31 (1981).

[394] 29 U.S.C. § 172 (1976) (authorizing operation of FMCS).

[395] UNITED STATES GOVERNMENT MANUAL 537 (1978).

[396] *See* Barrett & Tanner, *The FMCS Role in Age Discrimination Complaints: New Uses of Mediation*, 32 LAB. L.J. 745 (1981) (detailing recent involvement of FMCS in resolution of age discrimination suits).

[397] A mediator in the settlement of a dispute over tribal lands of the Hopi and Navajo Indian Tribes is provided for in 25 U.S.C. § 640d (1976).

[398] 5 U.S.C. §§ 571-76 (1976).

[399] *Id.* § 573(b)(3).

[400] The ACUS could retain the services of an individual to perform the inquiries and conduct the negotiation process as opposed to using its own staff. If, however, regulatory negotiation became an established tool for developing regulations, the ACUS probably would develop its own experts, such as mediators. *See infra* notes 425-32 and accompanying text (detailing benefits of mediator in regulatory negotiations).

[401] *See supra* note 255 and accompanying text (describing need for dominant parties to consider themselves equal for negotiations to succeed).

### 3. Preliminary Inquiries

As suggested above, an alternative way to initiate the regulatory negotiation process would be for a party—the agency, a private interest, or conceivably even an interloper—to suggest to the convening organization that regulatory negotiation would be appropriate in certain situations. The request would briefly explain the reasons for favoring regulatory negotiation over alternative methods. The convenor then would inquire whether there is a substantial likelihood that the agency would consider issuing a rule on that particular subject matter developed by means of regulatory negotiation. If so, the convenor would make the discrete inquiries to determine (1) whether a limited number of interests would be substantially affected by the proposed rule; (2) whether individuals could be selected who could represent those interests; (3) whether those interests would be willing to make commitments to negotiate in good faith to reach a consensus on a proposed rule; (4) the issues raised by the subject matter in question; and (5) a tentative schedule for completing the work of the committee. Each of these inquiries is important and will be considered in turn.

*Limited Number of Interests and Countervailing Power.* The convenor first should assess the number and relative power of the affected interests. The negotiation process will not work if the participation of a large number of diverse interests is required.[403] If any one of them, or a group of closely allied interests, has far more power than any other, the subject may be inappropriate for negotiation because the less powerful party may need the protections afforded by the traditional process. The threshold inquiry must be whether several parties have sufficient countervailing power such that no interest can achieve its will without incurring unacceptable sanctions from the others.[404] If this situation exists, the outcome of the regulation will be uncertain, and the parties may be insecure and thus may view negotiation as the way to break the deadlock.[405]

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[402] *See supra* note 242 and accompanying text (describing attempt of each party to maximize return in dispute resolution).

[403] *See supra* notes 257-58 and acompanying text (describing need for limited number of parties for successful negotiations).

[404] *See supra* notes 251-56 and accompanying text (describing need for countervailing powers before negotiations can begin).

[405] Thus, the parties are "deadlocked" because none can control the outcome of the regulatory process. The deadlock forces them to deal with each other as equals. If they fail to do so, the process will result in a decision they cannot control, because the agency will make the decision. *See Regulation Negotiation Hearings, supra* note 221, at 26 (Statement of Francis X. Murray) (describing need for equal status of parties with neither party confident of victory to initiate successful negotiations); Cormick, *supra* note 247, at 28 (describing recognition of equal status of participants as prerequisite to

*Individuals to Represent the Interests.* Some of the interests may be so dispersed and unorganized that it would be impossible to select individuals to represent each respective interest. Simply because the impact of a regulation would be widely felt, however, does not mean that effective representation is impossible. For example, even though a regulation dealing with air pollution may affect all urban dwellers, at least one environmentally active group would likely represent those interests. A concern related to representation of such dispersed and unorganized interests is the need to identify precisely the interests that a party actually represents.[406] For example, in one environmental negotiation, because the company involved was unsure of the interests the negotiators represented, it attempted to ascertain exactly which organizations would sign any agreement that was ultimately negotiated.[407] The convenor may have to meet with several members of an interest to focus their attention on selecting a limited number of representatives[408] because each member may believe that the representative selected as the negotiator should be its exclusive representative or that the member or it should be allowed to participate in addition to a closely aligned interest.[409] If the interest cannot be persuaded to select representatives, the convenor should make the determinations described below.[410]

*Commitment to Negotiate in Good Faith.* Even if the interests and their representatives are precisely identified, at least one major interest may refuse to participate. That interest may believe that it can secure its interests through the traditional rulemaking process, litigation, or legislation.

In regulatory negotiation, as in environmental negotiation, some parties may profit from delay or obstructionist tactics. If that organization is unwilling to participate, it would do little good to include the organization in negotiations. Such a party, however, may be necessary for the negotiations. Part of the preliminary inquiry with the interest groups should therefore involve a discussion of whether negotiations are the proper route.[411] As part of this inquiry, the

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participation); Fox, *supra* note 96, at 97 (describing partnership alternative to current adversarial regulatory process).

[406] Thus, it would not do to simply assume that because a representative at the table is an environmentalist, he adequately represents all environmentalists. There may be many "environmentalists" with differing views and positions on a particular topic.

[407] Cormick Interview, *supra* note 167.

[408] Negotiations of the sort described herein are unlike traditional labor negotiations in which the union and management representatives are usually quite well defined and do not need further clarification.

[409] The convenor may have to meet with various organizations that have allied interests to persuade them to band together to form a caucus, to develop a negotiating position, and to participate as a team in the negotiations. Part of this process may resemble the process of persuading the diverse interests that it is in their overall interest to negotiate as opposed to using alternative forms to develop a rule. *See* J. Dunlop, *supra* note 302.

[410] *See infra* note 438 and accompanying text (describing factors considered in determining whether interest requires actual representation at negotiating table).

[411] This informal discussion would be entirely off the record. A party would not be sanctioned for disagreeing and would not have to give up its adversarial posture. *Cf. supra* note 376 and accompanying text (describing preliminary question of feasibility of negotiations as confidential inquiry). Thus, a party could both agree to negotiate in good faith, and at the same time, file a lawsuit challenging agency action. The lawsuit would increase the group's power vis-a-vis the agency, as part of the posturing for a power position. *See supra* notes 251-53 and accompanying text (describing countervailing power as prerequisite for negotiations).

convenor could point out that the other interests have countervailing power and that *some* decision is inevitable. For example, an interest group, bent upon delay, might be convinced that the agency is likely to move ahead and that it cannot control the outcome. The convenor could convince the interest group that through participation in negotiations it might be able to exert some influence over the final decision.

If such an interest remained intransigent and refused to participate, the convenor then would have to decide whether negotiations could still be fruitful. Such a decision would involve several considerations. First, the convenor must decide whether other organizations whose interests are fairly close to those of the recalcitrant are willing to participate. Second, the convenor must determine whether the absent group's interests are significantly or only tangentially affected. Finally, the convenor must consider whether the group is such a major constituent that the agency would be reluctant to accept a negotiated agreement without its participation. Alternatively, the convenor could decide that the party ultimately would join in the discussions and participate in good faith in negotiations.

If the convenor ascertains that the appropriate interests are willing to participate in the negotiations, he should ask each party to pledge to negotiate in good faith to reach a consensus on a proposed rule. Of course, no party would be formally bound by such a pledge.[412] The pledge, however, could prove to be a useful reminder to the parties of their commitment if negotiations and emotions become frayed, a circumstance that clearly should be anticipated.

*Scope of Issues.* The convenor should then facilitate the preliminary definition of the issues to be considered in the negotiation. One participant in an environmental negotiation commented that agreeing on the scope of the discussions was the most difficult part of the task of negotiation; once the issues were in place, negotiations proceeded in a straightforward manner.[413] The convenor would facilitate definition of the issues through the iterative process of asking the parties what they believe should be involved in regulating a particular subject matter.[414] The issues would not be defined in any concrete way at the preliminary stage; rather, the initial outlines would be set to make the parties aware of the scope of negotiations. Matters outside the scope of discussion, such as those irrelevant to the statute authorizing the regulation or those involving such fundamental values would be identified at this point.

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[412] Even though a party is not bound by its pledge, one commentator proposed that an agency "look suspiciously" at the comments and challenges of any party that fails to negotiate in good faith. Note, *supra* note 96, at 1879.

[413] *See* Danielson Interview, *supra* note 162 (describing necessity of clearly distinguishing issues in Homestake Mine negotiation); Watson Interview, *supra* note 165 (same).

[414] Defining the scope of the issues, like ascertaining the parties to the negotiation, need not be terribly time consuming. This article envisions a listing of the issues involved, rather than development of a specific agenda for negotiations, such as was done in the environmental negotiations in the Homestake Mining dispute. *See supra* notes 162-65 and accompanying text (discussing use of negotiations instead of litigation to settle specific disputes between conservationists and mining company). The parties themselves probably would be able to define the issues with relative ease, even if they initially are inclined to take an extreme view of the issues. With sufficient shuttle diplomacy, the convenor could quickly determine the basic contours of the negotiation.

*Establishment of a Preliminary Schedule.* A preliminary schedule for completing various stages of work should be established. Experienced negotiators have pointed out that deadlines have several beneficial effects; they provide an incentive to reach agreement and a sense of accomplishment once the deadline is met.[415] The parties must realize that they may lose control of the regulatory process if they do not reach an agreement.[416] A deadline, which may be required by that of a statute or court order, provides a reminder that some decision is inevitable and that the parties therefore need to reach a consensus. Further, a deadline enables the parties to measure the likelihood of success on the project; the inability to meet the deadline for agreement may indicate the futility of trying to negotiate the particular regulation.

### 4. Certification to the Agency

After making these preliminary assessments, the convenor may determine that negotiations among interested parties would be unlikely to result in an agreement on a proposed regulation. In such a situation, the convenor would issue a notice stating that negotiations were inappropriate, without blaming any party for sabotaging the result. Publicizing one party's refusal to participate would be counterproductive because it could cause communications to break down even further. If, however, negotiation would be inappropriate because the parties differ on fundamental issues, the convenor should acknowledge this reason so that the political process can attempt to resolve the conflict. The convenor might conclude that although successful negotiation of a proposed rule would be unlikely, bringing together the major parties in interest to discuss the subject matter is desirable. In such a situation, the agency should empanel an advisory committee. The advisory committee could aid in narrowing the differences, clarifying the issues and positions, and providing guidance to the agency on the data required to resolve important questions.

If the convenor determines that regulatory negotiation would be feasible and superior to traditional rulemaking for developing a proposed regulation, the convenor would recommend to the agency that the negotiations be initiated. The report would include recommendations on the interests to be included in the negotiations, representatives to lead the negotiating teams of those interests, the issues to be considered, and a schedule for completion of the work. These recommendations would comprise a "contract" among the parties that participated in the iterative preliminary process. Alternatively, if the parties did not reach an agreement informally, the convenor's own determination would form the recommendation.

In determining whether negotiations should be undertaken, the convenor should make a reasonable effort to ensure that the negotiating group is composed of individuals who are competent and qualified concerning the subject matter of the proposed rule or that knowledgeable individuals are available to them. The group also should be balanced so that no interest or group of allied interests dominates[417] or constitutes more than a third of the members of the committee.[418]

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[415] Cormick, *supra* note 247, at 29 (describing sense of urgency as prerequisite to negotiations).

[416] *See supra* notes 262-63 and accompanying text (describing pressure to reach decision as aid to negotiation).

These criteria for determining the composition of the bargaining group are not binding on the convenor. Rather, they provide reasonable guidelines. For example, a rigorous analysis of the interests involved may reveal that a balance cannot be achieved because the number of interests is too great, or because an interest has no one who is technically competent in the subject matter of the regulation to represent the interest or to consult in the negotiations. Whether such situations would preclude successful negotiation thus would depend on whether the parties would be able to participate fully and on relatively equal footing. Consideration of these criteria is designed to aid in this determination.

If the convenor recommends that a regulatory negotiation process be established, the agency has several alternatives. The agency may decide, in its discretion, to adopt the recommendations. It may decide not to issue a rule at all or it may decide to follow more traditional procedures. If the agency decides to use regulatory negotiation, it should follow the recommendations of the convenor and use the proposed group of negotiators to ensure the effectiveness of the process. Alternatively, the agency and the convenor could agree to revise the recommendations.

The agency should take advantage of the convenor's recommendations because the agency can emphasize that the findings were made by a neutral third party and that the agency did not select the negotiating group.[419] Further, following the convenor's recommendations would allow the agency to build on the preliminary work performed in bringing the group together. Although the agency could negotiate its differences concerning the recommendations with the convenor, it should be willing to commit itself to the preliminary findings of the convenor unless it has substantial cause for concern. The likelihood of success of the negotiation, and ultimately the legitimacy of the resulting rule, rests on the confidence of the parties in the integrity of the negotiation group. If the agency refuses to accept the convenor's recommendations and imposes its own recommendation, the other parties may lose confidence in the group's integrity. Finally, the agency's participation in the development of the group would minimize its tendency to reject the group's report as "not invented here."

### 5. Existing Organization

Voluntary standards have been used in many regulatory programs.[420] In many ways, their development is a form of regulatory negotiation. The subject matter of a proposed regulation may be within the jurisdiction of an existing standards-writing organization.[421] If such an organization exists and enjoys the support and confidence of the affected interests,[422] it would be logical to conduct the negotiations under the auspices of that organization rather than to establish an entirely new framework for negotiations. The standards-writing organization may have developed procedures for ensuring fair representation of the respective interests and for ensuring that decisions actually reflect a consensus.[423] In such situations, an existing committee within the standards-writing organization could be regarded as a regulatory negotiation group, or an agreement reached by such a committee could form the basis of a proposed regulation.[424]

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[417] *See* Administrative Conference of United States, Recommendation 78-4 § (6)(c)(i), 1 C.F.R. § 305.78-4(6)(c)(i) (1981) (ACUS recommendation that voluntary standard committees in health area include a balanced array of relevant interests).

[418] REGULATIONS GOVERNING COMMITTEE PROJECTS, § 5-4(c) (National Fire Protection Ass'n 1976).

[419] *See supra* notes 377-78 (describing need to have disinterested party select representative negotiators).

[420] *See* P. HARTER, *supra* note 178, at 191-97 (describing potential value of external standards to agency); Administrative Conference of United States, Recommendation 78-4, 1 C.F.R. § 305.78-4 (1981) (recommendation on agency interaction with private standard-setting organization in health and safety regulations).

### 6. Mediator

The services of a mediator may benefit the regulatory negotiation process. If the issues are relatively well-defined or the participants have already established a good working relationship, a mediator may not be of significant help because the parties themselves could efficiently negotiate without outside intervention. In these instances, negotiations often take place within existing norms that govern their behavior.[425] For example, in the labor context, the parties often have a well-established, ongoing relationship and the issues involved in the bargaining, such as wages, fringe benefits, seniority, and working conditions, are usually clear. Therefore, in labor negotiations the parties can confront the issues directly and neither side can afford to be preemptory with the other, lest it damage the ability to cooperate in the future.[426] In the regulatory context, a number of interests may participate regularly in discussions on particular subjects. Despite the absence of a formal, ongoing relationship such as that of management and union, the interests may have established a working relationship that they have an interest in preserving. Thus, the negotiators may have developed sufficient trust and lines of communication to begin discussions and to confront relevant issues directly without the assistance of a mediator.

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[421] For example, OSHA used the existing processes of the National Electric Code, *supra* note 186, to revise its standards on the occupational exposure to electrical hazards. 46 Fed. Reg. 4034, 4036 (1981).

[422] Some interests have believed, correctly or not, that such organizations are sometimes unreceptive to their views and have either refused to participate or have been quite wary in doing so. *See* P. HARTER, *supra* note 178, at 112-16, 124-27 (discussing concerns about use of externally developed standards in regulatory setting, including need for participation by important constituencies). Thus, one of the questions the convenor should ask in deciding whether to recommend the establishment of a negotiation group is whether any organization currently writes consensus standards in the subject area of the proposed regulation. If so, the convenor should inquire whether the parties believe its processes are suitable for negotiating the regulation. Even if such an organization exists, some parties may believe that its processes are inappropriate, which may indicate either that negotiation is unlikely to be fruitful or that the particular concerns of the parties must be met. Nevertheless, an explanation of how the consensus process works may convince such a party that its fears are ill-founded.

[423] *See* 1 C.F.R. § 305.78-4 (1981) (preamble to ACUS Recommendation 78-4 on agency interaction with private standard organization describing functioning of such groups).

[424] *See id.* (recommendation on agency use of voluntary standards developed by private organizations).

[425] *See* Eisenberg, *supra* note 127 at 676-80 (describing elements of negotiation, such as claims of right and dependence between otherwise independent actors).

[426] *See* Susskind, *supra* note 83, at 6 n.14 (discussing differences between labor-management and environmental disputes). Although this observation, of course, is not always true, it differentiates this relationship from many in the regulatory context.

In most regulatory matters or environmental disputes, however, the issues are unclear and the parties may lack not only an established and ongoing relationship, but may be highly antagonistic to one another. Individuals assembled in an ad hoc manner for purposes of developing a regulation are likely to feel insecure about the process because it is novel and it requires the surrender of one form of power. A mediator or "facilitator" can help significantly in such situations. Indeed, such a person can help even when the parties do not begin the negotiation process with mutual distrust.

The first step in building the negotiating relationship among the parties occurs when the convenor establishes the initial working group of people willing to participate in the give and take of discussions. A mediator can continue that process through the negotiations. The mediator's function should be directed toward building trust and communication between the parties. Therefore, the parties must have faith and trust in the mediator.[427] A mediator must be someone with whom each party can meet privately and discuss candidly its concerns about the positions taken by the other parties. In addition, the mediator must help each party separate its true concerns from its initial position, and define criteria by which it would measure an agreement.[428] A mediator can focus the discussions in such private meetings and point out the extremes being taken by the parties. He can also offer creative solutions, both in private discussions and in face to face negotiations.

It is essential that the mediator preserve the trust of all parties. Therefore, he must justify his ideas and positions in terms of the parties' own interests.[429] Unless the mediator gains the trust of the parties, they may try to capture his attention and use him as as a bargaining tool. Alternatively, they may believe that he is not truly neutral and will not trust him with future communications.

As one experienced environmental mediator has observed, a mediator who has expertise in the subject matter of the regulation may interfere with this process.[430] First, such a mediator is likely to rely too much on his own assumptions or values rather than on those of the parties. Second, he may filter information based on his own independent assessments and focus on technical differences rather than on underlying values. Finally, he is more likely to lead the parties as opposed to facilitating communication among them. Thus, to avoid these difficulties, negotiations should not utilize a mediator with substantive expertise.

During the discussions an effective mediator can also resolve problems that could break down negotiations. For example, in one environmental negotiation, allegations indicating that one party was taking action inconsistent with its participation in the negotiations were published. If the allegations had been true talks would have broken down.[431] After one party raised its concerns about the allegations with the mediator, the mediator investigated the stories and was able to assure the party that no problem existed. The mediator also informed nonparticipants of the progress of the negotiations and focused parties' efforts on reaching an agreement.[432]

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[427] G. Cormick, The Ethics of Mediation: Some Unexplored Territory 3 (Paper presented to the Society of Professional Dispute Resolution (Oct. 24, 1977)).

[428] *See* Susskind, *supra* note 83, at 6 n.13 (describing three functions of mediator: procedural, communicative and substantive). This must be done delicately, however, lest antagonism develop between the mediator and the party.

[429] *Id.*

[430] Cormick, *supra* note 247, at 29.

In short, the function of the mediator is to facilitate discussions between the interested parties without taking a position. This role must not be confused with that of an arbitrator or even a chairperson of a meeting. Although the mediator may explore issues, propose alternatives, help draft the agreement, and carry communications between the parties for their consideration, his function is to generate ideas and to aid the parties in focusing on issues. Thus, the mediator should not direct the course of discussions. Indeed, negotiations are likely to be most successful when the mediator is required to do very little.

The group should determine preliminarily whether a mediator would be useful. In most significant regulations, a mediator will be useful. The convenor who has worked with the parties in establishing the preliminary negotiating group would be the likely choice as a mediator. The convenor usually will have developed a trust relationship between himself and the parties. Indeed, if another person took over as the mediator he would have to rebuild such a relationship.

### 7. Federal Register Notice

After the agency decides to develop a regulation through the negotiation process, it would publish a notice in the *Federal Register*. The notice would include a description of the subject matter of the regulation; the representatives comprising the proposed regulatory negotiation committee, including a description of the interest represented by each member and the position held by each member; the name and position of the proposed agency representative; the name of the proposed mediator, if any; the issues the committee proposes to consider; and a proposed schedule for completing the work of the committee. The notice also would invite members of the public to comment on whether the use of regulatory negotiation in developing a rule is appropriate; whether the appropriate interests are represented; whether the members selected adequately represent their interests; whether the committee is considering the appropriate issues; whether the agency representative is appropriate; and any other matter of interest. Comments would be due thirty to sixty days after publication of the notice. The primary purpose of the notice would be to ensure that no organization with a substantial interest in the subject matter of the regulation was overlooked and that the selected representatives adequately represent the interests of members of nominal classes.

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[431] Watson Interview, *supra* note 165.

[432] In labor negotiations a mediator is called in when the parties have reached a deadlock or discussions have broken down. In contrast, when mediators are used in other contexts, their primary function is to establish the negotiating relationship. Cormick, *supra* note 247, at 27.

8. The Final Committee

The agency and the convenor would then consider all relevant materials submitted in response to the *Federal Register* notice.[433] Two instances may arise in which the agency and the convenor would determine whether someone who is not in the preliminary group should be included on the final negotiations committee. Someone may argue that an appropriate interest is not represented. A nonparticipant might argue that it too should be allowed to participate directly with a representative at the table even though someone with a similar interest would be present.

Resolution of the inclusion question requires determination of three factors. The first question is whether the interest is sufficiently close to the issues under consideration that it has "standing" to participate. An interest may simply be too remote to be included.[434] An interest, however, should be excluded only if its connection to the rule is so remote that its allegation to the contrary is frivolous.[435] It seems unlikely that a group would want to participate unless it actually were interested in the outcome.

The second question is whether the proposed interest is different from the interests already represented. For example, a group that believes its representative should participate in the negotiation could argue that its position is different from that of another group that was selected to represent a certain interest. Although their initial positions may differ, their views may virtually coincide in the long run. The apparent differences might be manufactured to secure a representative at the negotiating table.[436] The agency and the convenor, therefore, must determine whether the applicant's interests really are divergent from those interests proposed in the notice, and whether one of the interests already selected for the negotiations adequately represents its interests.[437]

The final determination in the inclusion question is whether, even if the interest is already represented, the applicant nonetheless should have its own representative at the table. The negotiation committee is not composed of only one representative of each interest; rather, it includes representatives of groups that would be significantly affected. Those interests are likely to overlap to a significant degree.[438] Thus, in determining whether to add another representative, the agency and convenor should consider the number of representatives already present, the diversity of their views, and the centrality of the new organization to the issues.

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[433] The entire process of convening the regulatory negotiation group, from the initial inquiry submitted to the convenor to the close of the comment period, should take only 60-90 days. At first blush, this period might appear to delay rulemaking. The time required to convene the negotiations is probably insignificant, however, if the start-up time consumed when agencies undertake projects themselves is taken into account. Start up time may be particularly long when there is a great deal of disagreement over a proposal. Because the comment period helps ensure that the proper parties are identified and included in the rulemaking process, such disagreement is minimized. Thus, the potential benefits of negotiations clearly outweigh the extra time devoted to the comment period. Moreover, negotiated regulations reduce the time spent on development of facts and on agency and judicial review of the proposed negotiated rule. *See infra* notes 550-53 and accompanying text (describing agency and judicial review of negotiated rule). Therefore, the time initially expended will be more than made up by delays avoided at later stages.

[434] One environmental mediator argues that a party must meet a higher threshold to gain access to the negotiations than to influence them once the party is admitted. G. Cormick, Environmental Mediation in the U.S.: Experience and Future Directions 15 (Paper presented to the Annual Meeting of American Association for the Advancement of Science (1981)).

[435] *See infra* note 556 (discussing judicial tests to determine standing).

[436] Note, *supra* note 96, at 1878 n.42.

[437] In making this determination, the agency and convenor would follow the usual legal criteria for determining the adequacy of representation, such as in class action and intervention criteria. *See infra* notes 558-61 and accompanying text (discussing judicial methods of determining whether interests are adequately represented).

In determining whether additional organizations should participate, the agency and neutral convenor should seek the advice and consultation of the preliminary negotiation group. These interests and their representatives may be in the best position to determine whether a sufficient nexus exists between the applicant and the subject matter. The agency and the convenor, however, should not rely exclusively on the views of the preliminary negotiation group; rather, they should independently determine whether the new party should be represented. One of the main purposes of the *Federal Register* notice is to encourage interests that have not been identified by the consultative process to identify themselves and to seek admission to the negotiations. That the consultative process did not identify these interests may mean that the negotiation group, or at least some of its members, did not recognize or accept the legitimacy of the interests' positions. This possibility indicates the need for an independent assessment of the claim.

After reviewing the comment material, the agency and the convenor should agree on the final contours of the negotiating group, including its members, issues, and schedule. The agency would publish a notice in the *Federal Register* reflecting these determinations. The notice should provide the agency's reasons for the inclusion or exclusion of any interest. Because the issues, interests, and individuals engaged in the negotiations are likely to change over time,[439] the *Federal Register* notice should not be regarded as limiting negotiations to the terms listed in the notice. Rather, its function is to provide notice of the negotiation, and like a notice of proposed rulemaking, it defines a sphere of possible actions. If, however, negotiations depart fundamentally from the terms of the original notice, another notice in the *Federal Register* should be published.[440]

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[438] For example, several chemical companies and the Chemical Manufacturers Association, as well as several environmental groups, participated in the toxic substances dialogue group. *Regulatory Negotiation Hearings*, *supra* note 221, at 55-56 (testimony of Sam Gusman, Senior Associate of Conservation Fund) (identifying members of toxic substances dialogue group). Similarly, the National Coal Policy Project had multiple representatives of allied interests organized into caucuses. *See supra* text accompanying notes 206-16 (describing National Coal Policy Project as example of formation of complex negotiation group). Also, many environmental organizations were involved in the Homestake Mine negotiations, although one was clearly dominant. Mediation Agreement, *supra* note 164.

[439] As Susskind and Weinstein comment:

> [N]ot all participants can or should participate in a dispute resolution process to the same degree or over the same period of time. Those most directly concerned, for whatever reason, will want and should be permitted to participate from the start, in greater depth, and with greater frequency than those with less direct concerns. As the process continues, the parties will change. Groups whose concerns have been satisfied or who discover they have no real interest in the outcome will depart; other groups will become involved as their interests become clearer.

Susskind & Weinstein, *supra* note 92, at 339. In addition, if new issues emerge as the negotiations proceed, new parties may have an interest in the outcome of the negotiations.

[440] *See* Wagner Elec. Corp. v. Volpe, 466 F.2d 1013, 1019 (3d Cir. 1972) (holding that notice of

Assembling the final committee to negotiate the proposed rule undoubtedly will be a sensitive and important point in the regulatory negotiations. It is essential to the legitimacy of the process that each organization with a significant interest in the subject matter be offered representation in the group and that no interest should be turned away unless its connection to the regulation is remote. On the other hand, every interested individual person, firm, or organization cannot participate in negotiations because the process might become too unwieldy. If there are many potential participants, the major interests could be organized into caucuses to develop common positions and to use common representatives.[441] The convenor may find it necessary to meet with the respective interests to convince them to coalesce. One advantage of such caucus formation in regulatory negotiations is that the espoused interest actually would be represented more effectively than it would be in the formal, adversarial process that could result if everyone insisted on being at the table.

At this stage the process could degenerate into a fight over who gets to sit at the table, unless the similar interests band together for purposes of representation. The convenor and the agency must take great care to ensure that their decision in assessing interests and putting together coalitions is of the highest integrity. Otherwise, the time consumed and acrimony generated by this wrangling could easily vitiate the benefits of the regulatory negotiation process.

The determination of the participants should not be subjected to judicial review independent of the review of the resulting negotiated rule.[442] Judicial review at this stage would subject the entire process to delay and doubt and thus would interfere with the establishment of fruitful negotiations. Thus, a court decision could be deferred until the regulation is promulgated. The determination of the participants is not final agency action because the party seeking to participate would still be able to submit its views on the rule before it becomes final.[443] Further, because the convenor, a neutral third party, makes the essentially judicial determination of the applicant's standing or adequate interest, subsequent judicial review would provide adequate protection for the interest against improper participation determinations.

### E. THE NEGOTIATIONS

#### 1. Establishing the Groundrules

Because the parties are unlikely to have previously engaged in negotiations among themselves, they need to establish the groundrules that will govern, or at least guide, the negotiations.[444] A party who attends an unstructured session

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amendment to automobile safety regulations must be comprehensible to "not so knowledgeable" as well as knowledgeable interested persons).

[441] The parties coalesced in this manner in the Resource Conservation and Recovery Act settlement negotiations. Roisman Interview, *supra* note 106. The many challengers organized a steering committee and appointed representatives for each issue. *Id.*

[442] *See infra* notes 552-53 and accompanying text (describing reduction in judicial challenges to rules resulting from negotiated rulemaking).

[443] *See infra* notes 550-51 and accompanying text (describing procedure of publication and comment for proposed negotiated rule).

[444] G. Cormick, *supra* note 427, at 9.

without guiding principles is likely to maintain a defensive, adversarial posture simply because the process is unfamiliar. Therefore, defining the rules of acceptable conduct and the procedures under which negotiations will be conducted is important if the benefits of negotiation are to be realized. Although creative problem-solving can develop only with time, the rules can foster that process.

### 2. Rule of Reason

Milton R. Wessel has developed a set of dispute resolution principles that he calls the "Rule of Reason."[445] Perhaps the fundamental application of the guidelines to negotiations is to remind the participants periodically that their purpose is to reach a mutually acceptable agreement when possible, not to seek victory for their positions. The parties should keep in mind that they must sort out, weigh, and accommodate conflicting interests. Thus, they need to be reminded of the give and take and good faith of the negotiation process.

The National Coal Policy Project used Wessel's Rule of Reason to develop its set of negotiating principles:

> Data should not be withheld from the other side. Delaying tactics should not be used. Tactics should not be used to mislead. Motives should not be impugned lightly. Dogmatism should be avoided. Extremism should be countered forcefully. . .but not in kind. Integrity should be given first priority.[446]

The National Coal Policy Project found that "agreement to use these principles helped convince participants that [they] could resolve some of their differences constructively, and as it turned out, conducting project meetings in the spirit of the Rule of Reason did facilitate the search for workable solutions to the difficult issues being addressed."[447] In essence, these principles establish a code of conduct designed to guide, to the extent possible, the participants in good faith negotiations.

### 3. Confidentiality

One significant issue the participants must face at the outset of negotiations is the extent to which the process will be open to public inspection. Under current theories agencies are accountable for reaching rational results based on the neutral exercise of their discretion. Thus, the rulemaking process is subject to public scrutiny at virtually every stage. For example, ex parte rules prohibit discussions and transmittal of data unavailable to others;[448] advisory committees are open to public attendance;[449] the Sunshine Act requires that meetings of collegial agencies be open to the public;[450] and the Freedom of Information

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[445] M. WESSEL, THE RULE OF REASON 19-24 (1976) (discussing methods of dispute resolution in corporate litigtion); M. WESSEL, *supra* note 80, at 94-101 (discussing dispute resolution techniques).

[446] NCPP SUMMARY, *supra* note 206, at 23; *see* M. WESSEL, *supra* note 80, at 97-98 (complete list of rule of reason guidelines); M. WESSEL, *supra* note 445, at 19-24 (same).

[447] NCPP SUMMARY, *supra* note 206, at 3.

[448] *See supra* note 128 (judicially imposed restrictions on ex parte meetings result in inability to gain information and to reach consensus).

[449] *See infra* note 457 and accompanying text (FACA requires meetings be open).

[450] 5 U.S.C. § 552b (1976).

Act requires agencies to provide the public with many of their internal documents.[451] In short, the current political climate distrusts meetings and other communications between agency officials and members of the private sector unless they are open to all. Therefore, confidential exchanges are frowned upon, if not banned outright. In keeping with this theory, the parties to a regulatory negotiation may agree to conduct their affairs in public.

Several experts, however, believe that negotiation is a process best carried on in private.[452] Several examples demonstrate the benefits of privacy. First, the negotiators must make concessions on different issues to permit maximization of their own goals. Moreover, negotiators must be able to explain the results of their negotiations to their constituents and the reasons for conceding a particular issue that the negotiator believes is not of central importance. Second, a party may be reluctant to yield confidential data that can be useful to negotiations, if doing so will destroy its confidentiality.[453] Third, a party reasonably could be reluctant to engage in the give and take of the negotiation process if it thought that a tentative position it raised in the negotiations subsequently would be held against it in another forum, such as litigation or an ensuing rulemaking process.[454] Finally, and perhaps most significantly, a public forum may cause some of the parties to continue to posture and to take a hard, unyielding position. In short, public scrutiny could mean that the detrimental aspects of the adversarial process result without the correlative benefits of a neutral decisionmaker.

The negotiators therefore should be able to close their meetings in appropriate circumstances.[455] The procedures of the negotiation process itself provide the safeguards that accrue from public meetings. The political legitimacy of the resulting rule derives from the acceptance of the rule by the parties in interest, and not on the public procedures by which it was developed. Further, the parties should feel no inhibition from meeting on a confidential basis with the mediator or other parties to the negotiation.[456]

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[451] *Id.* § 552 (1976 & Supp. IV 1980).

[452] J. Dunlop, *supra* note 302, at 18-21 (private negotiations prevent injection of press into relationship between negotiators and constituents); *see Regulatory Negotiation Hearings*, *supra* note 221, at 57 (statement of Sam Gusman, Senior Associate, The Conservation Foundation)(favoring closed discussions between businessmen and environmentalists).

[453] Although the information ultimately may be revealed in the explanation of the basis of a proposed rule, the party would be more reluctant to reveal such information initially because negotiations might break down and confidentiality lost without the corresponding benefit of having achieved a proposed rule.

[454] At the Federal Trade Commission, for example, both private companies and agency representatives were reluctant to attend a meeting for precisely such reasons. Reich, *supra* note 96, at 88-89.

[455] It should be noted, however, that many highly technical and controversial standards are written under procedures that ensure public access. Indeed, ACUS considers the decisionmaking process an important element in an agency's decision whether to adopt an existing standard. *See* Administrative Conference of United States Recommendation 78-4(6)(c)(viii), 1 C.F.R. § 305.78-4(6)(c)(viii) (1981) (discussing whether the standard proposed for adoption should be formulated under public scrutiny and review). Thus, the negotiation process clearly can work in public. Most of the experience in the standards area is with making technical judgments, however. Many of the regulations under consideration here involve questions that are more political. The distinction should not be pressed too far, however, because experience may show that the regulations could be negotiated in open meetings.

[456] Indeed there would be no true ex parte communications because the competing parties are represented in the negotiations. Also, because the fruits of the negotiation would be published as a notice of proposed rulemaking, the public would have an opportunity to check any decisions that are

Under current law an agency likely would be inhibited from participating in a closed regulatory negotiation session. FACA[457] would require that the negotiation group be established as an advisory committee. Thus, FACA also would require that notice of advisory committee meetings be published in the *Federal Register* and that such meetings be open to the public.[458] On the other hand, agencies regularly meet on a confidential basis to settle lawsuits challenging rules.[459] Arguably, one of the main advantages of working out rules in settlement rather than in negotiations before the final rule is issued is precisely the absence of ex parte rules which prohibit a confidential, sleeves-up working session in which the parties work out the details of a good rule. This is not to say that all meetings should be closed; rather, the committee should be able to close the meeting in appropriate circumstances.

If the committee decides to close the meeting, additional issues must be confronted. One is an agreement on how the group will release statements to the public. A basic requirement that no one may publicly characterize a position taken by another in a public statement[460] could prevent pressure from being applied on parties through press releases. Or, the committee could agree that no public statement be made without review by all the parties.[461]

A procedure should also be established whereby the parties' positions and the information exchanged cannot be held against them if negotiations are unsuccessful. This procedure would be similar to the traditional rule of evidence that prohibits the subsequent use of settlement offers[462] and the customary practice of developing a protective order that preserves privileges and confidences for documents exchanged during discovery or in settlement negotiations.[463] Professor Reich has characterized this practice as a form of "use immunity,"[464] under which the parties would agree not to use the positions taken during negotiations or the information exchanged in a subsequent proceeding.

In addition, the parties need assurance that the information generated in negotiations will not be available under the Freedom of Information Act

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made. The rationale of the ex parte rules, moreover, applies with greater vigor after the notice of proposed rulemaking is published and after the close of the comment period.

[457] 5 U.S.C. app. §§ 1-15 (1976 & Supp. IV 1980).

[458] *Id.* § 10(a)(1) (1976). The head of the agency to which the advisory committee reports may determine that a portion of a meeting should be closed in accordance with the criteria by which agencies may close meetings under the Sunshine Act, 5 U.S.C. § 552b(c),(d)(1) (1976). A very clumsy process would result if every time a regulatory negotiation committee thought it would be advisable to conduct its sessions in private it had to obtain the permission of the agency head before doing so. Therefore if regulatory negotiation is to be used, FACA should be modified to provide a less cumbersome procedure for closing meetings.

[459] *See supra* note 197 (member of press seeking admission to settlement meeting turned away).

[460] This procedure was followed in dialogue groups of businessmen and environmentalists. *Supra* note 223 and accompanying text; *Regulatory Negotiation Hearings, supra* note 221, at 56 (statement of Sam Gusman, Senior Associate, Conservation Foundation).

[461] This procedure was followed in the National Coal Policy Project. *Regulatory Negotiation Hearings*, *supra* note 221, at 36 (statement of Laurence I. Moss, Environmental Caucus, Chairman of National Coal Policy Project).

[462] FED. R. EVID. 408; FED. R. CIV. P. 68.

[463] *See* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2018, at 144 (1970) (discussing use of protective orders to preserve privileged information).

[464] Reich, *supra* note 96, at 83.

(FOIA).[465] In most cases, the negotiation group would receive the same treatment as an advisory committee, which would make FOIA applicable.[466] That status might preclude the withholding of confidential information.[467] If the negotiation information is not protected from disclosure, the parties may feel inhibited from writing issues and taking tentative positions for fear that they would be released and held against them if negotiations fall apart. Therefore, it should be made clear, perhaps through legislation, that the FOIA would not apply to a regulatory negotiation committee and that confidentiality could be maintained.

### 4. Principled Negotiations

The Harvard Negotiation Project developed a series of principles to facilitate reaching agreement or, as the title of its directors' book puts it: "Getting to Yes."[468] Although the Rule of Reason defines the relationships among the negotiators, the principles suggested here are addressed to each individual negotiator. A mediator would periodically remind the parties of the following three principles.

*Focus on the respective interests, not on the initial positions.*[469] Parties develop initial positions for several reasons. They might be a package compiled by the representatives from the "wish" lists of the constituents.[470] They might enhance the ultimate bargaining position. They might reflect the party's belief that the initial position is the only solution to the problem. Communications can quickly break down if the parties' initial positions are the focus of discussions because each side will dig in to defend its starting point, and antagonism will result.[471]

Fisher and Ury provide the example of two people quarreling in a library, one wanting the window open and the other wanting it closed.[472] They argue back and forth, unable to reach an agreement. When the librarian asks what the problem is, one says that the library is stuffy and that he wants the window open for some fresh air; the other says that the open window is blowing his papers about. The librarian proceeds to open a window around the corner which allows ventilation without the draft. The moral is that once the parties' respective interests are addressed, negotiations can attempt to accommodate them.[473]

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[465] 5 U.S.C. § 552b (1976).

[466] *See* 5 U.S.C. app. § 10(b) (1976) (all advisory committee documents subject to public inspection). *But cf.* Public Citizen Health Research Group v. HEW, 668 F.2d 537, 544 (D.C. Cir. 1981) (Professional Standards Review Organization (PSRO) not an agency subject to requirements of FOIA).

[467] In addition, if the committee is regarded as an advisory committee rather than an agency, the application of the "intra-agency" memoranda exemption is unclear. 5 U.S.C. §552(b)(5)(1976) (allowing agencies to prohibit public scrutiny of inter- or intra-agency memoranda or letters).

[468] R. FISHER & W. URY, GETTING TO YES (1981).

[469] *Id.* at 41-57.

[470] Dunlop points out:

> [I]t is vital to sense the priorities sought by each side, and the severity of their opposition to proposals, in truth rather than merely in formal petitions or in public pronouncements . . . . [N]egotiations or mediation is often the art of putting together packages that recognize the true priorities on each side that will 'sell' to both parties informally as well as in any formal ratification process.

J. Dunlop, *supra* note 302, at 12-13.

[471] Fisher and Ury argue:

> When negotiators bargain over positions, they tend to lock themselves into those positions. The more you clarify your position and defend it against attack, the more committed you become to it. The more you try to convince the other side of the impossibility of changing your opening position, the more difficult it becomes to do so. . . . As more attention is paid to positions, less attention is devoted to meeting the underlying concerns of the parties.

R. FISHER & W. URY, *supra* note 468, at 5.

A concrete example of how successful negotiations resulted when parties focused on their respective interests involved the Snoqualmie Dam.[474] Environmentalists opposed construction of a dam while farmers advocated it.[475] If their initial positions had been maintained there would have been no way of reaching an agreement. After analysis of their interests, it turned out that agreement could be reached because both parties sought the preservation of the valley and were able to negotiate an agreement on how that could be done. Similarly, in an enforcement action, the EPA sought to force a company to change the fuel it was burning and to retrofit its boilers; the company resisted.[476] By focusing on positions, the parties reached a deadlock. Focusing on their interests they were able to reach an accommodation. The company was interested in efficiency and EPA was interested in reducing air pollution. They agreed to a new, modern boiler that maintained efficiency while reducing pollution.[477]

Interestingly, the parties themselves do not always recognize what their interests are. They need to define what they really want,[478] to sort out their priorities, and to define the criteria by which they will judge an ultimate agreement. Because the party may enter the negotiation with a particular position that does not reflect an interest analysis, the mediator or the parties themselves should probe to discover just what the respective interests are.

*Seek options that allow mutual gain.*[479] The reason people enter into negotiations is that they believe they can better achieve their goals through negotiation than through some other process.[480] Thus, agreement is more likely to occur if it can be cast in terms that permit each party to win, as in the library window and Snoqualmie Dam examples. The negotiators can then view themselves as a collaborative[481] group seeking a solution to a problem, rather than as combatants. To be sure, this goal is frequently elusive when the parties have conflicting interests that must be reconciled. The goal of attaining collaboration, however, can be borne in mind by the parties as they try to invent solutions that allow each side to win its important priorities. The parties must compare what is practically achievable in negotiations with what is likely to occur should negotiations break down.[482]

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[472] *Id.* at 41.

[473] *Id.*

[474] *See supra* notes 160 & 233 and accompanying text (detailing Snoqualmie Dam dispute).

[475] *Id.*

[476] D. Gilmore, *supra* note 267, at 40-41 (describing joint problem solving from serious bargaining in open, flexible negotiations).

[477] *Id.*

[478] Defining what a party wants includes both what it seeks to obtain from the negotiations and what aspects of the other parties' proposals it opposes. Hence, the ranking of priorities is both positive and negative, ranging from those aspects the party strongly desires to those it strongly opposes.

[479] R. Fisher & W. Ury, *supra* note 468, at 58-83. This is the "win/win" condition in which both parties are better off as a result of the dispute resolution. *See supra* note 265 and accompanying text (describing win/win situation of game theory).

[480] *See supra* notes 240-41 and accompanying text (discussing parties' need to believe they will profit from negotiation).

[481] Although negotiations often require parties to trade interests and to make compromises, collab-

*Define objective criteria.*[483] By agreeing during the negotiation to the objective criteria by which an ultimate agreement might be judged, the parties can facilitate negotiation. Fisher and Ury give the example of a person negotiating with an insurance company over the value of a car that was destroyed. The two sides agreed on criteria by which value is determined and then applied the criteria to the car in question.[484] Similarly, during a recent give and take session among environmentalists, industry groups, and state representatives on controversial environmental issues involving the Superfund, the parties informally reached a consensus on several key issues, including a ranking model for deciding which toxic waste sites would receive immediate attention.[485] This model establishes criteria that can be used to mechanically establish a priority for sites that can then be subject to expert judgment.[486] Objective criteria obviate the need to wrangle over the individual parties' rankings during the negotiation process.

In the EPA enforcement case described above, one of the major contentions between the parties was how air pollution from the plant should be measured.[487] The plant was able to demonstrate that its model was more accurate than the one EPA intended to use.[488] Thus, once the parties established objective criteria, they could explore alternative ways of meeting their respective goals and measuring the proposed solutions against them.

### 5. Single Text Procedure

One way of reaching agreement is by means of the "one text procedure."[489] The parties engage in a brainstorming session in which they identify the issues involved and potential solutions.[490] No one is committed to the issues or solutions; rather, the goal of the process is to define the contours of a possible

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oration allows all parties to achieve a common goal. *See supra* note 265 (discussing difference between collaboration and negotiation).

[482] The negotiators must compare proposals to their "BATNA"—best alternative to a negotiated agreement. R. FISHER & W. URY, *supra* note 468, at 104-06.

[483] *Id.* at 84-98.

[484] *Id.* at 96-98.

[485] *Environmentalists, Industry, State Reps, Agree on Key Superfund Issues*, INSIDE EPA, Oct. 9, 1981, 7-8.

[486] *Id.* at 8.

[487] *Supra* note 476 and accompanying text (discussing accomodation of company's interest in fuel efficiency and EPA's interest in reduction of air pollution).

[488] *Id.*

[489] R. FISHER & W. URY, *supra* note 468, at 118.

[490] *Id.* at 62-63. Such brainstorming sessions are likely to be fruitful, both between the constituent elements of each party or interest represented, as well as among the representatives at the negotiations. Because the purpose of the exercise is to define potential solutions, the parties should be free to explore ideas ranging from conservative to radical extremes. *Id.*

agreement.[491] The fundamental groundrule of this procedure is that as thoughts develop, no one is permitted to make adverse comments or criticisms.[492] Rather, the function of the brainstorming is to develop as many ideas as possible.[493] A mediator assists in developing the laundry list. The parties then begin weeding out the inappropriate issues and raising new ones. The text is circulated for comment and revision. The range of agreement is narrowed through the iterative process, and the remaining issues can be confronted directly.[494] For example, the Mining Task Force of the National Coal Policy Project used this process to identify the issues involved.[495] By pinpointing the issues, the parties defined the nature of the disagreement among themselves and they were able to focus on the reasons for the disagreements,[496] which in turn lead to agreement on what research was necessary.

### 6. Developing the Factual Base

Obviously, no single approach to developing factual material is necessary or even the "best" way for the parties to reach an agreement. Rather, the parties themselves will have to decide what information is reasonably necessary to enable them to make a responsible judgment and how to obtain that information. The following is a brief review of three approaches that have been used in negotiated agreements: common research; review and comment; and data mediation.

*Common research.* The parties may be able to agree on what research is needed and may decide to conduct that research jointly. For example, the Mining Task Force of the National Coal Policy Project needed to conduct research before the Project could reach an agreement.[497] Two staff members, one representing the environmentalists and one representing industry, conducted research, developed proposed findings of fact, and drafted a report.[498] The report was based on observation, discussions, and literature review. The Task Force discussed the report at its meeting, revised it accordingly, and conducted new research as needed. The Task Force as a whole conducted on-site research by examining various mines. When there was disagreement about the facts, the Task Force resolved the question on the basis of the best current information.[499] The policy discussions were thus more precisely focused than they otherwise would have been.

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[491] *Id.* It would be very difficult to hold these sessions in public because each party could reasonably fear having some suggestion or observation attributed to it in a way that would make it difficult to disown in the future. Moreover, without an agreement to hold the exchange confidential, a party might fear that its suggestion would be perceived as a fixed position. Finally, the parties might fear revealing confidential information or positions if the sessions were public. These possibilities would hamper the whole process, which is designed to enhance the generation and free exchange of thoughts and ideas. Thus, these brainstorming sessions should probably remain confidential.

[492] *Id.* at 62. Ridicule or criticism of one party's suggestions would probably chill its willingness to explore creative ideas and would foster adversarial relationships.

[493] *Id.* Fisher and Ury further suggest that the groups' ideas be written on a paper or chalkboard. In that way, the group would coalesce and focus on solving the problems confronting it. Thus, the members would avoid confronting each other. *Id.* at 64.

[494] *Id.*

[495] NCPP SUMMARY, *supra* note 206, at 17-18.

[496] *Id.*; Murray Interview, *supra* note 206.

[497] NCPP SUMMARY, *supra* note 206, at 18 (research enabled group to focus on specific problems and solutions).

[498] *Id.*

Similarly, the Health Effects Institute, a research organization funded by the EPA and industry, was created to conduct research on health questions pertinent to EPA regulation.[500] The representatives to the Institute are currently attempting to reach agreement on research protocols.[501] Even though the representatives might agree on the necessary research and its protocol, they may not necessarily agree on the implications of that research. Thus, they reserve arguments over the implication of that research.

*Review and Comment.* The respective parties may themselves have a great deal of information that can be used as the basis for an agreement. They may be reluctant, however, to share that information unless they share it in a context that fosters agreement and does not abuse the information exchange. Under one solution, one party provides its technical information in a session in which the other parties may ask clarifying questions, but may not challenge the data. The other parties then make similar presentations. This process was followed in the Homestake Mine regulation.[502] Although the other parties' expertise enabled them to ask probing questions, they did not challenge the information in an adversarial fashion.[503] The parties found that agreement on the facts facilitated agreement on common principles.[504]

The participants in such information exchanges pointed out, however, that the success of this approach depends on the respective parties' ability to draw on sufficient expertise to question and assess the data as presented. If they lack such expertise, they will be unable to develop the common understanding on the facts, and they will retreat to a position based on principle.[505] The give and take of discussion among experts defines the gaps in knowledge and what information is needed for a decision on the merits. In the Homestake Mine negotiations this approach reduced the adversarial environment, and some experts that had refused to participate in a formal proceeding were willing to provide their services.[506] Indeed, the contacts developed during the negotiation process continued after agreement was reached and the parties worked together toward common solutions of additional problems.[507]

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[499] *Id.* One of the important aspects of this fact finding was that it was done on a regional basis, without attempting to "homogenize" the facts to fit the nation as a whole. The Task Force decided that regional differences were critically important and had to be preserved in the recommendations. *Id.*

[500] Fox, *supra* note 96, at 102. One commentator explained:

> The aim of the institute is to supply both the EPA and the industry with the best common base that independent scientific investigation can provide for determining appropriate regulations. . . . [T]he institute [is] "fiercely independent." Its structure was carefully devised to provide maximum protection for a set of scientific processes that will yield results whose integrity and quality will be above question.
>
> The formation of the institute brings to fruition the efforts of many government and industry representatives to find a mechanism for improving research on health effects while reducing costs and government-industry friction. Representatives from the U.S. auto industry and from 17 importing companies have formally indicated their support of the institute.

*Id.*

[501] Fox, *supra* note 96, at 101.

[502] Danielson Interview, *supra* note 162.

[503] A variant of this process has apparently been followed in some Nuclear Regulatory Commission licensing proceedings. Roisman Interview, *supra* note 106. In that case, the agency held a meeting with one of the parties in interest and invited the others to observe. The ground rules were that the observers were not permitted to ask questions. The agency representatives asked clarifying questions, but did not cross-examine. The process developed a base of information in a nonadversarial way so the parties were able to better discuss their concerns. *Id.*

[504] Danielson Interview, *supra* note 162. The Mining Task Force of the National Coal Policy Project also found that "differences began to dissolve as [they] moved away from discussing generalities and began to focus on specific issues." NCPP SUMMARY, *supra* note 206, at 18; *see* Murray Interview, *supra* note 206 (agreement on research findings enabled group to focus on problems and solutions).

[505] Badaracco describes how standards limiting occupational exposure to vinyl chloride were nego-

*Data Meditation.* The parties may have differing views of the facts and, therefore, it may be necessary to reconcile them to form the basis for policy choices. The parties, of course, can attempt such reconciliation through peer review, in which someone reviews the research of another, critiques it, and attempts to replicate it. Through this iterative process scientific and technical agreement emerges. Frequently, however, inadequate time prohibits the use of the normal scientific methods. The parties must make a more immediate agreement to seek some other method of determining a factual base, again without agreeing to policy implications.[508]

For example, as part of EPA's rulemaking with respect to particulate emissions of diesels, General Motors Corporation wanted to avoid the duplication of effort, remove unconscious bias, and ensure that appropriate research was conducted before the rulemaking proceeding began. It proposed that a panel of referees evaluate the research conducted by the agency and by industry. General Motors would appoint one referee, the EPA would appoint another, and the two together would appoint a third. The panel would assess the validity and accuracy of the parties' research submissions.[509] Although the EPA initially agreed to the process, it was never implemented.[510]

Wessel has proposed holding open conferences in which all experts in a field are invited to participate in a give and take discussion designed to explore factual matters.[511] The purpose of such a conference would be to reach a scientific consensus on scientific issues. The conference would not attempt to negotiate or reach an agreement by accommodation.[512] The parties also could utilize a process similar to that followed by the Mining Task Force of the National Coal Policy Project,[513] thereby defining the factual issues involved in the question and attempting to reach a workable agreement on those facts.

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tiated in three European countries. J. BADARACCO, *supra* note 93. He observes that important questions concerning available technology, costs, compliance, and medical problems, can be viewed more objectively and independently because they can be verified and confirmed by the respective parties. *Id.* at 298.

[506] Danielson Interview, *supra* note 162.

[507] Cormick Interview, *supra* note 167.

[508] *See generally*, Straus & Greenberg, *Data Mediation of Environmental Disputes* in ENVIRONMENTAL COMMENT (Wash. Urban Land Inst. 1977) (discussing data mediation process).

[509] Potter, *Third Party Review*, in GOVERNMENT, TECHNOLOGY, AND THE FUTURE OF THE AUTOMOBILE, at 367, 370 (1978).

[510] Interview with David Potter, Vice President, General Motors Corporation (July 29, 1981) (copy on file at *Georgetown Law Journal*).

[511] M. WESSEL, *supra* note 80, at 173-80.

[512] *Id.* at 174-75.

[513] *See supra* notes 497-501 and accompanying text (discussing joint research and reporting).

### 7. Keeping in Touch

The individuals participating in the negotiations must bear in mind, and sometimes be reminded, that they are representatives of broader interests. They must keep in touch with the views of their constituents and inform them of the progress of the negotiations. As talks progress toward a possible agreement, the representatives must ensure that the agreement is acceptable to their interests, lest the entire process fall apart at the end. As one experienced mediator has pointed out, the individuals at the table can end up seeing each other's points of view to such an extent that they lose touch with the positions of their constituents.[514] Thus, if ultimate agreement is to be reached, the group needs to know that the individuals can sell the agreement to their respective constituents.

## F. EXTENT AND NATURE OF THE CONSENSUS

### 1. What is a Consensus

The purpose of the regulatory negotiation is to enable the parties in interest to reach an "agreement." Just what that means, however, remains unsettled. Does it mean unanimity; no "reasonable" dissent; concurrent majorities, in which a majority of each interest agrees; a substantial majority of those present; a simple majority; or some other calculation? Even the words used to describe the process are unhelpful. The definition of consensus in *Webster's Third International Unabridged Dictionary* includes: "group solidarity in sentiment and belief"; "general agreement: unanimity, accord"; "collective opinion: the judgement arrived at by most of those concerned."[515]

What constitites "consensus" is one of the most difficult and complex questions in regulatory negotiation.[516] Yet, consensus is an essential ingredient of reaching an agreement. The willingness of some parties to participate at all may depend on how consensus is defined. Moreover, it influences both the internal dynamics of the group and the deference to which the agreement is entitled. Although sound arguments support each of several definitions, there are also arguments against each. Hence, consensus probably will remain a controversial subject, at least until some experience is gained in negotiating regulations. Because no a priori definition guides negotiations, the ground rules for what constitutes agreement must be defined and understood before the process begins.

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[514] Cormick Interview, *supra* note 167 (if negotiators become too close, constituents may accuse them of selling out). Further, as Dunlop states: "[I]t is a practical rule-of-thumb that one is nearing agreement across the table when there is more difficulty within each side than between the leading spokesmen across the table. Each principal negotiator is often as much preoccupied with handling the internal necessities as in controversy with the opposing negotiator." J. Dunlop, *supra* note 302, at 16.

[515] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 482 (P. Gove ed. 1971).

[516] Indeed, what constitutes consensus is one of the most difficult and complex questions that attends any group decision, and considerable academic literature has developed analyzing the various options. Two of the major contributors to this literature have characterized the question this way: "Democratic theorists, economic as well as political, have long wrestled with the intriguing ethical question of how 'best' to aggregate individual choices into social preferences and choices." R. LUCE & H. RAIFFA, *supra* note 240, at 327. For a sampling of the literature, see *id.* at 327-70. For example, Arrow demonstrates that not all of the basic assumptions of the theoretical construct of majority rule can be true at the same time. K. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1951). Mueller collects and analyzes much of the literature on nonmarket decisionmaking. D. MUELLER, PUBLIC CHOICE 68-89 (1979). In particular, he analyzes the strengths and weaknesses of alternative modes of decisionmaking, including majority rule, optimal majorities, unanimity, and logrolling. *Id.* at 19-58.

For these purposes, the most acceptable definition of consensus would be "general agreement," which means that no party dissents significantly from the shared position. General agreement, however, does not necessarily mean unanimity, because even if someone disagrees, the dissent may not be significant enough, either in weight or number, to destroy the agreement. Thus, the party may dissent on grounds that generally are viewed as irrational, or the party's interests may not be sufficiently affected to regard its dissent as significant. In group consensus a dissenting minor interest, one not directly and immediately affected, can be disregarded even on a major issue without destroying the consensus. The dissent of a major interest, however, could destroy a consensus even on a minor point.[517] An aphorism from the voluntary standards context sums up this analysis: Positions are weighed not counted. When deciding whether a consensus has been reached, the nature of any dissent is considered, including the strength of the dissenter's views, the basis for the dissent, and the relationship of the dissenter to the issues involved.

Ultimately, whether a consensus exists must be determined more by fingertip feel than by any sort of mathematical calculation. One negotiator has stated that if you have to count votes, you do not have a consensus.[518] Rather, like pornography,[519] consensus is hard to define, but you know it when you see it. Unfortunately, this uncertainty raises some difficult questions. Can procedures be developed to ensure that the committee has reached consensus? Who decides whether a consensus has been reached?

### 2. Structured Decision

A voluntary standards organization may be used to negotiate the regulation.[520] The consensus process used by such organizations in developing voluntary standards ensures structured decisionmaking. The consensus process generally requires that standards be approved by considerably more than a simple majority of the committee, although unanimity is not required.[521] Moreover, it requires that negative votes and other objections to a standard be promptly and carefully considered. Finally, the consensus process provides a form of appeal by which an outvoted committee member may have the actions of the committee reviewed.[522] These procedures, like those of hybrid rulemaking, are generally designed to ensure the rational consideration of the various views of the participants. If these procedures are followed, it may be appropriate to say that the regulatory negotiation committee has reached an agreement when less than all of those present assent.

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[517] Murray Interview, *supra* note 206.

[518] *See* Gusman Interview, *supra* note 232 (discussing inappropriateness of voting to establish consensus).

[519] *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (discussing definition of pornography).

[520] *See supra* notes 420-24 (discussing use of voluntary standards organization in negotiation).

[521] One standards organization has stated that "[c]onsensus implies much more than the concept of a simple majority, but not necessarily unanimity, which often can be achieved only by compromises that reduce the quality of the standard." AMERICAN SOCIETY FOR TESTING AND MATERIALS, THE VOLUNTARY STANDARDS SYSTEM OF THE UNITED STATES OF AMERICA 7 (1978) [hereinafter ASTM].

[522] *See* Administrative Conference of the United States, Recommendation 78-4, 1 C.F.R. § 305.78-4(6)(c)(vi) (1981) (development of voluntary consensus standards in health and safety context requires review of dissenting views); P. HARTER, *supra* note 178, at 117-20; REGULATIONS GOVERNING COMMITTEE PROJECTS §§ 1-4 (National Fire Protection Ass'n 1977) (describing appeal rights of dissenting members).

### 3. Lack of Structure

Ad hoc groups formed for purposes of regulatory negotiation, unlike standards writing organizations, will not be subject to existing rules ensuring a structured decision. Hence, some other method must be developed to determine consensus. For example, an individual, or several individuals, might be entrusted with the authority to decide if any dissents are reasonable or significant. Such a judgment is inherently value laden[523] and delicate because the purpose of the process is to achieve agreement. Indeed, the very legitimacy of the process rests on the agreement of the interested parties. Thus, for purposes of regulatory negotiation, it may be better to require unanimity for agreement on a proposed rule.[524]

### 4. Unanimity

Unanimity has several benefits. First, parties may not agree to participate in a negotiation process if they think that their interests could be disregarded and a regulation proposed over their dissent. They reasonably may decide that it is better to retain whatever power they have by refusing to participate. For example, four different interests may require representation, of which three are essentially commercial and one is a public interest group. That public interest group reasonably might fear being outvoted by the commercial interests because, although the commercial interests may differ among themselves, they at least share the common interest of being economically motivated. The public interest group may decide that its greater power lies with its ability to prompt congressional intervention. In addition, an agency might refuse to participate in a situation in which a group of commercial interests could override it because it would be unseemly if its representative were outvoted and the group nonetheless expected the agency to promulgate the agreement as a regulation. Requiring unanimity ensures that *no* interest will be outvoted. Thus, when an agreement emerges from the negotiations, there can be no doubt that a particular interest agreed to it. Requiring unanimity, therefore, preserves the essential element of power.

Unanimity also is necessary if negotiation replaces the need for extensive factual research as one of the bases of a the legitimacy of the regulation. Currently, an agency must conduct factual research to demonstrate the existence of a problem and the feasibility of the proposed solution. In regulatory negotiations, such research would be unnecessary if the parties concurred on both issues. For example, when an advisory committee recommended particular regulatory action to an agency, over the dissent of the affected industry, the industry involved had a strong incentive to persuade the agency not to follow the recommendations.[525] The agency, upon review, found the proposal did not have an adequate technical basis. Although the committee voted to recommend something that a *majority* of the participants desired, it failed to determine whether the recommendation was technically feasible. If there had been unanimity, or even substantial consensus, the technical feasibility of the recommendation would not have been an issue.[526]

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[523] Deciding whether someone is an idealogue or is being unreasonably intransigent requires a valuing of the position taken.

[524] Unanimity would not be required under structured decisionmaking. It may be that if regulatory negotiation is attempted, experience will indicate some other manner of determining a consensus.

The unanimity requirement also puts pressure on the negotiators to make good faith compromises in their efforts to reach an agreement.[527] If a party knows that an agreement will be reached, even over its dissent, it can maintain a hard line and refuse to compromise. The dissenting party may continue to posture on behalf of its interest group if it believes that placing itself at a distance from the regulation is politically expedient. Unanimity requires each party at the negotiation table to take responsibility for an agreement.[528] Because the party may not want to frustrate the committee by holding out, he may modify his position. Of course, the party could refuse to assent to the agreement if it were not in the overall interest of his constituency.

Moreover, unanimity "weighs" the strength of dissent. A party that is not completely happy with an agreement would file a dissent if permitted to do so. Under rules requiring unanimity, that party would be asked whether the dissent is strong enough to block agreement. A party faced with that situation frequently would agree that his adverse views are not sufficiently strong to stop the overall agreement. For example, virtually all of the recommendations of the National Coal Policy Project were unanimous. On at least one occasion, however, an individual agreed privately that the negotiation group's position was in the public interest in the long run, but he felt that the group's position would have such an adverse short run effect on his constituents that he should avoid public endorsement of it.[529] Thus, in that situation, it seems unlikely that the representative would have blocked the agreement.

### 5. Problems with Unanimity

Requiring unanimity has its own problems, of course. Unanimity means that any party to the negotiation can stop the entire exercise by its intransigence. Such control could reward the ideologue because others might make compromises they believed are unwarranted simply to achieve agreement. Therefore, requiring unanimity could lead to a proposed regulation that reflects a lowest common denominator, rather than a fair accommodation of the competing interests. A person experienced in the voluntary standards area described a requirement for unanimity as "giving each party a loaded gun."[530] The potential failure to accommodate fairly competing interests could cause the parties to view the negotiation process with skepticism. This problem is simply the converse of the need to preserve power: although each party worries that the others will not agree, each attempts to preserve *its* ability to control the outcome.

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[525] Safety Standards for Matchbooks, 42 Fed. Reg. 22,656 (1977).

[526] *See* Safety Standards for Matchbooks, 42 Fed. Reg. 22,656, 22,660-61 (1977) (CPSC rejects limited burn time requirement for book matches because technical feasibility not demonstrated); Conversation with David Pittle, Commissioner of CPSC (Oct. 14, 1981). The question involved the offeror's proposal for limiting the time a match would burn.

[527] Gusman Interview, *supra* note 232 (unanimity requirement provides mindset for agreement).

[528] One experienced enviromental mediator and careful observer of the process argues that agreements frequently can be obtained faster by requiring unanimity because the parties address the task of reaching agreement. The parties collaborate rather than try to use the system for all they can get. Interview with Gail Bingham of the Conservation Foundation (July 13, 1981)(copy on file at *Georgetown Law Journal*).

[529] Letter from Laurence I. Moss to Philip J. Harter (May 12, 1981) [hereinafter Moss Letter] (copy on file at *Georgetown Law Journal*). It should be noted, however, that Mr. Moss believes unanimity should not be required. *Id.*

In most negotiating situations, including those involving complex questions of policy, agreement of all the parties must be attained. The parties must all agree to the stipulation that is presented to the court settling litigation or to the agency settling a proceeding.[531] Similarly, all the parties to complex environmental settlement negotiations must agree.[532] Not only is unanimity important for preserving power, the fear that it is unreachable is overdrawn as evidenced by the number of different situations in which it is actually obtained.

### 6. Determining the Consensus

Although at a minimum, negotiating parties should try to accomplish unanimity, that may prove to be impractical. Therefore, three alternative ways of determining whether a consensus has been reached should be seriously considered: structured decisions; concurrent majorities; and substantial majority.

*Structured decisions.* The group may develop the regulation under rules of organizations that develop consensus standards. Such organizations have rules that assure the consideration of every dissent by an impartial and respected appeals body and that establish the criteria for determining consensus.[533] If the group reached the decision by following such rules, the decision would be acceptable as reflecting a consensus.

*Concurrent majorities.*[534] The primary benefits of unanimity can be achieved if all the represented interests concur, instead of requiring the agreement of each individual representative. In such a situation, the members of the negotiating group are identified by interest and caucuses are formed.[535] Each caucus of the group must then support the decision. Each individual member of the negotiating group, however, need not agree specifically. This process would mitigate the disruptive effect of an ideologue because others that share a similar interest would not be persuaded by that person's position and would agree with the proposed action. The National Coal Policy Project, for example, used this process.[536]

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[530] Interview with Walter V. Cropper, American Society of Testing and Materials (Sept. 29, 1981) (copy on file at *Georgetown Law Journal*); *see also* ASTM, *supra* note 521 (requiring unanimity diminishes the quality of standard).

[531] *Cf.* Morgan, *supra* note 24, at 42 (discussing Federal Power Commission's success in settling litigation); *see* Comment, *supra* note 195, at 789 n.587 (approximately 90% of Federal Trade Commission cases disposed of through consent orders). *See generally* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, FEDERAL ADMINISTRATIVE LAW JUDGE HEARINGS STATISTICAL REPORT FOR 1976-78 (July 1980).

[532] *See supra* notes 226-37 and accompanying text (discussing settlements in environmental area).

[533] *See supra* notes 521-22 and accompanying text (discussing procedures in structured decisions).

[534] This term is adopted from John C. Calhoun. Calhoun, *Disquisition on Government*, in AMERICAN GOVERNMENT 33 (P. Woll ed. 1975).

[535] Some caucuses, however, may consist of a single member.

*Substantial majority.* Another alternative for determining consensus would be to require that a proposal be supported by a substantial majority of the group, such as two-thirds, three-fourths, or all but one individual. Even then some interests may be reluctant to participate because they fear being outvoted. Thus, this process might be better if the ground rules also provided that at least one representative of each interest must support the proposal. That requirement would make clear that each *interest*, rather than each individual, retained its power by being able to veto a proposal.

### 7. Lack of Consensus

The negotiation group may, of course, be unable to reach a consensus, regardless of how one defines consensus. The lack of consensus may reflect disagreement over almost every issue or it may extend only to a few aspects of a proposal.

If a consensus is not reached on a proposed regulation, the group should make the following determinations: whether the group is likely to reach consensus if discussions are continued; whether a consensus is unlikely, but a report detailing the extent of any consensus would be beneficial;[537] whether the parties are deadlocked and it would not be profitable even to attempt to define their positions in a report.[538] The experience and observations of the mediator, if any, can be helpful, but ultimately the parties themselves must make these decisions.[539]

## G. REPORTING THE AGREEMENT

After the committee reaches a consensus it must prepare a documentary package that the agency will use to translate the agreement into a regulation. A primary element of the package is the language the group proposes that the agency adopt as a regulation. If the group simply agreed on general principles or made specific recommendations without proposing specific regulatory language, a major obstacle to the implementation of the agreement would remain. Transforming the agreement into a regulation requires the writer to become familiar with the underlying basis of the proposal. Many details that were not foreseen in a general agreement may arise, forcing the drafters to make a myriad of policy choices, some large, some small.[540] Moreover, drafting a regulation requires sustained concentration and considerable resources. The time transaction costs required to draft the regulation could inhibit the agency from moving forward. Thus, the group itself should be responsible for drafting the detailed language of a regulation.[541] Doing so will force the group to concentrate on the details of its agreement and to define precisely the meaning of the agreement.[542] Accordingly, the group is in the best position to codify its agreement because it is the body that reached the consensus.

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[536] Moss Letter, *supra* note 529 (discussing consensus approach).

[537] If a party or interest holds out unreasonably and thus blocks the group consensus on a proposal, the remaining parties or interests could, of course, close ranks in support of the position on which they agree in any subsequent rulemaking. In such a case the dissenting party would be faced with taking on the world. The chances of its prevailing in the subsequent rulemaking proceeding might be substantially reduced unless the party has the residual power to achieve its will or others interpret its position as reasonable. Thus, before holding out, a party should bear in mind that doing so may actually diminish its ability to influence the ultimate decision, and that the route to actual participation and influence is through good faith negotiation.

[538] For example, some interest may be unable to develop a position on some issues. Hence, it would do little good to attempt to define the range of disagreement among the parties because a major player was unable to do so during negotiations. Or, if the entire process simply breaks down, the parties would revert to attempting to influence the decision through the exercise of other forms of power.

[539] This aspect of the proposal is in direct contrast with the Federal Advisory Committee Act (FACA), which provides that a government representative must be authorized to adjourn any meeting and the committee is not allowed to conduct any meeting without the presence of a government representative. 5 U.S.C. app. § 10(e) (1976). Although this authority to adjourn and conduct meetings is defined solely in terms of individual meetings, the government representative effectively could end the entire process by refusing to attend any future meetings. In regulatory negotiations if any major interest were to walk out, the group would have to decide whether discussions would continue.

The group also should prepare a preamble for the proposal when it is published in the *Federal Register*. Because the purpose of a preamble is to inform the agency, the courts, and the public of the "basis and purpose" of the proposed regulation,[543] it should include the composition of the group; the nature of the consensus the group reached; the issues raised during the discussion; a short narrative discussion about each section of the standard, including both the purpose of the section and the reasons for its form; and the data and other information considered by the group in developing the regulation.[544]

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[540] Susskind and Weinstein point out that formalization of an agreement into a written document should not be viewed as a "pro forma chore"; rather, drafting the agreement forces the parties to reexamine past decisions in light of subsequent developments. The parties develop an overview of the entire agreement. This process may expose some areas that the parties thought were settled, but which in fact were not, or those in which a modification must be made to achieve final consensus. Susskind & Weinstein, *supra* note 92, at 345. Dunlop also emphasizes this factor: "[A]n axiom of negotiations ordinarily is that there is no agreement until all items in dispute have been resolved one way or the other, unless otherwise explicitly specified." J. Dunlop, *supra* note 302, at 17.

[541] It is, of course, unlikely that the group as a whole would actually draft the proposed regulation from start to finish. Rather, the proposed regulation could evolve from the "one text" procedure. *See supra* notes 489-96 and accompanying text (discussing single text procedure to identify issues and possible solutions). Or, it could evolve from drafts prepared by group members or staff. Nonetheless, the group as a whole would endorse the final regulatory language regardless of how it actually evolved.

[542] Although the group may be able to reach agreement on general principles, it may be unable to narrow the agreement to a specific regulatory proposal. Thus, requiring the group to attempt to draft the language would help define the range of the agreement. Even if the agreement falls short of regulatory language, the process is still valuable because it provides the agency with important information. Many of the benefits of a regulation developed by consensus, however, would be lost. That the parties are unable to reach agreement on the actual language may demonstrate that the agreement is more fragile than a consensus. Moreover, failure to draft the actual regulation may show that some highly controversial issues remain for the subsequent rulemaking proceeding.

[543] The statement of basis and purpose would resemble the rationale statement of a voluntary standard, a topic that recently has received considerable analysis. D. SWANKIN, RATIONALE STATEMENTS FOR VOLUNTARY STANDARDS—ISSUES, TECHNIQUES, AND CONSEQUENCES (1981) (National Bureau of Standards Publication-GCR-81-347) (publication defining, discussing and examining consequences of rationale statements); P. HARTER, *supra* note 178, at 141-50 (discussing the need for a procedural history and rationale of voluntary standards).

[544] The statement of "basis and purpose" must enable the court "to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did . . . . The paramount objective is to see whether the agency, given an essentially legislative task to perform, has carried it out in a manner calculated to negate the dangers of arbitrariness and irrationality in the formulation of rules for general application in the future." Automotive Parts and Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968). Thus, if the agency publishes the proposed rule as a regulation it should explain the proposal in a preamble that meets these criteria. Indeed, if the agency itself is to review the standard it will require the same information to make an intelligent decision.

The preamble resulting from regulatory negotiations need not be as extensive as those currently required for technical rules.[545] Under the traditional hybrid process, the legitimacy of the rule rests on a resolution of complex factual materials and rational extrapolation from those facts, guided by the criteria of the statute. Under regulatory negotiation, however, the regulation's legitimacy would lie in the overall agreement of the parties. Thus, the only facts that must be included in the preamble to a negotiated regulation are those that the negotiation group believes are necessary for an informed decision. The agency would not be required to prove either the existence of a problem or the feasibility of the proposed solution if those who would be affected agree on both issues.

The information in the preamble would be helpful in several regards. First, it would enable public commentators to point out failures to consider particular issues or to take into account information. Second, if the regulation is issued, someone may attempt to obtain an exception from it on the grounds that, although its situation is included within the letter of the regulation, the group did not consider its situation in drafting the regulation.

The preamble should also explain the areas in which the group was unable to agree. If the disagreement is one of fundamental values in which there can be no reconciliation, a statement of that fact would make it clear that the regulation in question should not be viewed as compromising these deeply held values. On the other hand, the disagreements may reflect only that the parties were unable to reconcile them by negotiations. If a decision must be reached in some other forum, such as by the agency in the traditional process or through legislation, the preamble can highlight and focus attention on the disputed issues. Thus, the preamble would serve the valuable function of narrowing the issues in disputes, identifying information that is accepted as necessary, ranking priorities, and identifying potentially acceptable solutions.[546]

### H. AGENCY ACTION

Although the agency retains the ultimate power to issue a regulation, the purpose of a regulatory negotiation is to draft a regulation, and not merely to lend advice and consultation to an agency. The negotiation process is likely to attract talented experts to spend the time and resources in negotiating a complex topic only if they have reasonable assurance that the agency will implement their proposal. Indeed, there would be little incentive to strike the hard bargain if the whole process could be easily overturned or "relitigated" before an agency issued the regulation.[547] Therefore, an essential ingredient of the success of the regulatory negotiation process is an agreement by the agency to publish the group's proposed regulation in a notice of proposed rulemaking, unless the agency has good cause for not doing so.

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[545] The purpose of a regulatory negotiation is to enable the parties to address the range of issues involved in writing the regulation and to make deals in which each party attempts to maximize its own interests. Thus, the process envisions an interest giving in on one issue to achieve victory on another issue it believes is even more important. The explanation of the proposed regulation should not be so detailed that it inhibits the ability of the parties to negotiate candidly with one another or to explain the agreement to their respective constituencies. As Dunlop observes: "Negotiators desire to explain the concessions that have been made and the terms they have achieved directly to their constituents rather than have the press or media initially make that explanation and state the merits, or deficiencies, of the settlement." J. Dunlop, *supra* note 302, at 19. Although Dunlop spoke of media coverage in the context of labor settlements, the same principle applies here: the preamble should describe why the proposal meets the needs of the group and what it does, but should not go into the details of the various concessions. It should describe the regulatory result and the underlying logic of the regulation, just as modern preambles do, but not necessarily the process by which it evolved.

[546] *Cf.* Schuck Letter, *supra* note 341 (listing virtues of negotiations).

The agency should view the package submitted by the regulatory negotiation group as it would view a briefing package submitted by the division of the agency entrusted with developing such a regulation. Because a senior member of the division would have participated in the development of the proposal and agreed to it, that view would be justified. He should have kept the relevant members of the agency abreast of developments during the negotiation process and should have taken into account their viewpoint. Such participation does not mean that the agency can or should prevail on every issue; the regulatory negotiation process would be a sham if that were so. The proposal, however, would reflect a reasonable accommodation of the differing views of the parties and presumably would be within the bounds of acceptable alternatives because the major interests ratified the proposal.

If the subject of the regulation raises significant political issues, the negotiation group should keep Congress and the White House abreast of negotiation developments. If a mediator participates, he should touch base with relevant congressional committees and offices within the White House to permit the negotiation group to consider their views during the negotiations and to avoid political surprises.[548] The report of the consensus also should be furnished to Congress and to the White House to enable them to communicate any substantial concerns to the agency. Providing such notification to the political forces and permitting their concerns to be taken into account will help insulate the agency from political attack. In addition, this procedure would be a political prod to the agency because it would need a good reason to reject the consensus of competing forces. If the agency rejects the consensus without good reason it might appear that the agency is changing the results of the negotiations capriciously.

The agency administrator and senior staff would review the proposed regulation and its accompanying materials for consistency with applicable statutes and with the agency's existing policy, just as they would review an internal briefing package.[549] They may, of course, determine that the proposal should be modified or supplemented. For example, the circumstances that gave rise to the regulatory proposal may have changed so significantly that no regulation on the topic will be issued. Alternatively, the factual basis of any such regulation may have changed so completely since the group completed its negotiations that the proposal must be reconsidered. Or, the agency may determine that a major interest was not represented during negotiations and that its views must be taken into account before the proposal reflects a consensus of significantly affected interests. Finally, the agency may determine that the areas of disagreement are so central to the rule ultimately proposed that traditional methods of rulemaking should be used.

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[547] John Dunlop points out: "It is axiomatic that negotiations recognized to be preliminary to a further stage are unlikely to elicit best offers, although very important functions relating to factual information, exploring priorities among issues, alternative approaches, and sensing internal considerations may be achieved." J. Dunlop, *supra* note 302, at 22. Thus, in labor negotiations that are subject to mandatory mediation, mediation may not be effective if it is preliminary to actual bargaining. In the regulatory context, such a preliminary mediation process would be more akin to an advisory committee than to regulation negotiation . Although advisory committees serve a useful function, they lack many of the benefits described above.

[548] The mediator in environmental disputes regularly acts as a liaison by keeping relevant agencies informed. Cormick Interview, *supra* note 167; Watson Interview, *supra* note 165.; *see* Cormick, *supra* note 247, at 27 (mediator assists in maintaining communications with those "not at the table").

[549] Because the agency's team in the negotiation would include a representative of its general counsel's office, the agency's legal concerns should be considered during the committee's deliberations. Of course, the parties could develop their own legal views concerning the suitability of a proposed action. Even if the parties are unable to reach agreement on the legal issues, the negotiating group at least would provide a forum in which those issues could be discussed, unlike the current hybrid process.

The need to modify or to supplement a negotiated proposal, however, should not arise frequently because the relevant considerations should have been addressed during the negotiation process and reflected in the consensus. Therefore, the agency should have good cause for not publishing the proposal. The agency should not second guess the negotiators or attempt to regain a concession it made during negotiations.[550] Nevertheless, the agency administrators are not the slaves of briefing packages proposed by their staff, and they may require additional work to be done on proposals. If the agency reasonably finds good cause for refusing to accept the proposal it could decide not to publish a proposed rule. Alternatively, the agency could ask the negotiating group to reconsider and submit a new proposal that takes its concerns into account. Except in these kinds of unusual circumstances, however, the agency would publish the group's proposed rule in a notice of proposed rulemaking.

The proposal and any changes the agency proposed should be published verbatim, even if the agency believes the proposal should be modified or amended. This procedure would allow the public to comment on the respective proposals. This procedure also would allow the agency and the group to sort out the competing contentions in developing the final regulation.

The public's comments on a proposed rule developed through a regulatory negotiation process should contain few surprises. If conducted properly, the negotiation process would have generated adequate consideration of the competing interests. Thus, the comments on the proposed rules would be aimed at perfecting the proposal rather than advocating any sort of fundamental departure from the propsed rule. If, however, an interest was overlooked or a member of an interest that was represented believes an inappropriate accommodation was struck, publication of the proposal would enable both parties to make their arguments. The regulatory negotiation process should eliminate major controversy during the period after publication of the notice, unlike the hybrid rulemaking process in which the notice is an invitation to fight. Thus, the notice and comment provisions of this proposal should be quite brief; they would not result in a protracted process such as we have become familiar with in the hybrid process.

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[550] The attitude of the agency in accepting the negotiation group's proposal is critical. It must accept the proposal unless there is good cause for not doing so. Stewart, *supra* note 112, at 1353 n.286. If the agency adopts an attitude of second guessing the group or rejecting the proposal because the agency did not develop it, the regulatory negotiation process will only add one more layer to an already protracted process. The agency also could alienate its important constituents by adopting such an attitude.

The agency should refer comments to the negotiating group for consideration. The group then can adapt new information to the accommodations made during the initial negotiation. The group can decide whether it adequately considered the issues raised in the comments. If it decides the issues were adequately addressed, no change would be required. If it decides that the comments raised a new issue, it would modify its initial proposal accordingly. One of the significant functions of the comments to a regulatory negotiation proposal would be to permit parties to consider whether their interests were adequately represented in the negotiations. The agency and the negotiating group together must consider that issue.

After the negotiating group considers the comments and decides how to respond to them, the agency must then consider the recommendations of the negotiating group and the comments received in response to the notice of proposed rulemaking in reaching its decision on a final regulation. It may modify the proposal in response to those comments. The agency, however, should not use this opportunity to modify the proposal unless the modification responds to a meritorious comment[551] because the process would quickly fall apart if the agency acted unilaterially.

### I. JUDICIAL REVIEW

Negotiations may reduce judicial challenges to a rule because those parties most directly affected, who also are the most likely to bring suits, actually would participate in its development. Indeed, because the rule would reflect the agreement of the parties, even the most vocal constituencies should support the rule. This abstract prediction finds support in experience in analogous contexts. For example, there has been virtually no judicial review of OSHA's recent safety standards that were based on a consensus among the interested parties.[552] Moreover, rules resulting from settlements have not been challenged.[553]

Some parties, of course, would seek judicial review of rules developed through a regulatory negotiation process. The nature of such judicial review could have an important bearing on the success or failure of the negotiation process itself. If individuals can boycott the negotiation group and then obtain judicial review under a stringent standard, the regulatory negotiation process could unravel.

The nature of the factual determinations and the record developed during the regulatory negotiation process would differ significantly from those developed in the hybrid process. Moreover, highly qualified people may refuse to participate in the negotiation if a court, at the behest of someone who refused to participate, undoes their work. Therefore, a stringent standard of review would be inappropriate.[554] Requiring a less stringent standard of judicial review, however, does not imply that judicial review is unimportant to the regulatory negotiation process. Rather, the nature of judicial review would have to be tailored to the regulatory negotiation process. Such adaptation of judicial review to the regulatory negotiation process would resemble the adaptation of the rulemaking process to rules with extensive factual records.

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[551] If the agency publishes proposed amendments to the negotiation group proposal, the agency and the group should carefully appraise the comments received in response to the notice. They should determine whether the original proposal, the proposed amendments, or some other modification should ultimately be adopted. Although the agency necessarily has the final word in this matter, as in the other matters, it should restrain the exercise of this authority.

[552] Seymour Interview, *supra* note 168.

[553] *See* Cohen, *supra* note 194, at 880 (meeting between EPA and municipal officials prior to publication of regulation governing discharges and municipal sewer systems resulted in no state or municipal court challenge).

A rule should be sustained to the extent that it is within the agency's jurisdiction and actually reflects a consensus among the interested parties. If the rule is outside an agency's jurisdiction or fails to reflect a consensus, traditional standards of review should be followed. This standard of review has several major components,[555] which include determinations of standing, a rule's conformity with applicable statutes and adequacy of interest representation.

### 1. Standing

The reviewing court would begin its analysis, just as it must under current forms of review, by determining whether the challenger has standing to bring suit. Thus, the court would determine whether a sufficient nexus of interests between the petitioner and the challenged rule exists.[556] The determination of standing not only serves its traditional constitutional function, but it also helps define the appropriate interests that should be represented during the negotiation process.

### 2. Conformity with Law

The court also would conduct its customary review to ensure that the rule conforms with all applicable substantive statutes. The court would invalidate the rule if it were outside the agency's jurisdiction. Because the respective parties concur that the rule is within the agency's jurisdiction, there is an issue whether the court should grant some deference to that determination. Thus, the court might be inclined to allow broader statutory interpretation more than it might under a traditional process. For example, assume that OSHA promulgates a regulation limiting exposure to a toxic chemical and that representatives of labor and industry agree to implement the regulation through work practices and personal protective equipment requirements rather than having industry retrofit plants to provide engineering controls. A narrow reading of the Occupational Safety and Health Act might support an interpretation requiring that protection be in the form of engineering controls if technologically feasible.[557] Because the affected parties, representatives of labor and industry, agreed to the use of personal protective equipment rather than engineering controls to control exposure levels, a court should defer to this judgment so long as it is not manifestly unacceptable.

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[554] Stewart, *supra* note 112, at 1348 (proposing relaxation of "hard look" standard of judicial review when negotiations yield consensus).

[555] The standard of judicial review is designed to impose the proper incentives on the various players. These incentives include encouraging the relevant interests to come forward and participate; encouraging the agency to ensure that the appropriate interests are represented; encouraging the agency to refrain from unjustified modifications of the negotiated proposal; and encouraging all interests concerned with a proposed rule to make their concerns known to the agency so that appropriate action can be taken.

[556] Precise formulations of a test to determine standing have proved elusive, and the concept seems to vary over time and according to the circumstances in which it is applied. Thus, no specific test is attempted here. The court simply would apply the traditional law of standing in judicial review of a rule developed by negotiations. *See* Valley Forge Christian College v. Americans United for Separation of Church & State, 102 S. Ct. 752, 758 (1982) (standing subsumes blend of constitutional and prudential considerations; at minimum plaintiff must show he suffered actual or threatened injury that can be traced to challenged action and is likely to be redressed by favorable decision); Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979) (minimum constitutional requirement for standing are that plaintiff suffers distinct and palpable injury likely to be redressed by grant of requested relief); Duke Power Co. v. North Carolina Envtl. Group, Inc., 438 U.S. 59, 72 (1978) (standing requires distinct, palpable plaintiff injury with causal connection between injury and challenged conduct); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38 (1976) (standing depends on whether plaintiff injury capable of being redressed by favorable decision); United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 686 (1973) ("injury in fact" element not limited to economic harm; includes harm to aesthetic and environmental well-being); Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972) ("injury in fact" test requires party to be among injured); Barlow v. Collins, 397 U.S. 159, 167 (1970) (judicial review of administrative action inferred when finding of congressional intent to protect interest of class of which plaintiff member); Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 157 (1970) ("aggrieved persons" entitled to judicial review of ruling under Administrative Procedure Act).

### 3. Interest Representation

The court should then determine whether the plaintiff's interest was in fact represented in the negotiation group. The court must determine whether the challenger had an adequate voice in the negotiations in order to distinguish between complaints that an interest did not win all that it sought and complaints that an interest's views were not considered. In its review, the court should apply standards similar to those used by courts in other situations in which they must determine whether the interests of affected groups were adequately represented. For example, the Federal Rules of Civil Procedure require the court, in assessing whether a class action should be maintained, to determine whether "the representative parties will fairly and adequately protect the interests of the class."[558] Similarly, the Federal Rules authorize intervention in litigation as a matter of right if a disposition of the suit would impair the applicant's ability to protect himself "unless the applicant's interest is adequately represented by existing parties."[559] The courts also make an interest representation determination in public law litigation when the decree would have a widespread and immediate effect similar to that of an agency's regulation.[560] Thus, courts have evolved ways of assessing whether a party's interests are adequately represented.[561] Moreover, the report furnished by the group that describes the issues considered during negotiations can help the court in its assessment because it will reveal whether issues of interest to the petitioner were raised and, if so, how they were resolved.

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[557] *Cf.* American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 511-12 (1981) (promulgation of OSHA regulations should be guided by feasibility of ensuring employee health not by cost-benefit analysis).

[558] FED. R. CIV. P. 23; *see also* 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1765-70, 1799 (1972) (discussing representatives protecting interests of class, intervention in class actions).

[559] FED. R. CIV. P. 24; *see also* 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1909 (1972) (discussing adequacy of representation).

[560] *See* Chayes, *supra* note 205, at 1310-13 (discussing problem of interest representation).

[561] The issue also arises in the labor law context. The union, in return for its grant of exclusive representation of a company's employees, assumes the duty to represent the employees' interests fairly and in good faith. Medlin v. Boeing Vertol Co., 620 F.2d 957, 961 (3rd Cir. 1980).

If the court determines that the petitioner's interest was represented during negotiations, the petitioner should bear the relatively high burden of showing that the group failed to consider an issue central to the rule and that there is a substantial likelihood it would have been significantly changed if the issue had been considered. On the other hand, if the court were to determine that the interest was not represented, it would next consider whether some reason excuses participation and whether the party submitted its views to the agency in response to the notice of proposed rulemaking.

### 4. Failure to Participate

A party that refuses to participate fully in the negotiations should be estopped from challenging the regulation after the process has run its course. Thus, a party should not be allowed to challenge a rule on the grounds that its interest was not represented unless it can demonstrate that extraordinary circumstances excused its failure to make a similar allegation in response to the initial *Federal Register* notice establishing the regulatory negotiation committee.[562] The purpose of the preliminary notice is to ensure that the parties interested in a rule have the opportunity to argue that they should be included in the regulatory negotiation group. An interest that fails to do so should, therefore, face the same stringent standard of review as someone who was represented. Otherwise, an interest that remained silent during negotiations could achieve its aim through unilateral action before a court, thereby avoiding the give and take of discussions. Of course, the party is free to refuse to participate directly or to participate by submitting only comments, but it should not gain an advantage by doing so.

If the party applied for inclusion, and the agency and the convenor denied the application, the court should determine whether that decision was an arbitrary and capricious application of the interest representation test. If the court concludes that the applicant was arbitrarily excluded, it would apply the traditional standard of review to the rule, rather than the relatively high threshold imposed on those interests that were represented in negotiation or on parties that failed to participate in negotiation.

### 5. Administrative Exhaustion

Even if a party is excused for failing to participate because it was satisfied with representation or was denied admittance to the negotiations, a party should not be permitted to challenge either the substance or the procedure of the negotiated rule unless it first exhausted its administrative remedies.[563] Thus, the challenging party must demonstrate (1) that it raised its contention during the comment period; (2) that it was impractical to raise its objection, or the grounds for it arose only after the close of the public comment period; or (3) that some truly extraordinary circumstance excused presentation of the question to the agency during the comment period.[564] This exhaustion of administrative remedies enables the agency to consider the party's position and to modify a proposed rule accordingly. It is inefficient from all perspectives to allow a party that refused to participate in the rulemaking to challenge a rule in a forum in which the agency is unable to consider the position.

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[562] *See supra* notes 433-43 and accompanying text (discussing representation of appropriate interests).

[563] *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 553-54 (1978) (imposing threshold requirement on parties challenging agency action to notify agency of concerns when agency had opportunity to take appropriate action).

The requirement that a party exhaust all administrative remedies is even more applicable when the rule is developed through regulatory negotiation. It is essential to the efficient functioning of the system that the views of parties be represented during negotiations. Therefore, a party should be required to seek inclusion at the outset of negotiations or present its concerns on the rule during the notice and comment period to enable those developing the rule to take its views into account. Thus, if the petitioner submitted its concerns in response to the comment period, its interests were not represented,[565] and its failure to participate is justifiable, the party's administrative remedies would be exhausted, and the court then should apply the normal standard of review.

### 6. Agency Modifications

When an agency modifies a proposal of a regulatory negotiation group,[566] the modification should be subjected to the normal standard of judicial review rather than the standard for a negotiated rule. In that situation, the agency has substituted its judgment for that of the group. Because the rule's legitimacy rests on the agency procedure by which it was developed,[567] the court should apply its normal review of the facts and of policy.

### 7. Factual Review

It would be inappropriate to require the negotiating group and the agency to conduct research similar to that required in the hybrid process because a negotiated regulation is generated not through development of enormous factual material, but through the agreement of the parties on the relevant facts and issues. Thus, the court should require only that the group have enough information to enable it to make an intelligent choice. The court should apply a standard of review similar to that applied in *Automotive Parts and Accessories Association v. Boyd*[568] rather than the standard in *Citizens to Preserve Overton*

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[564] Several statutes similarly preclude judicial review of matters not raised before the agency. For example, the Securities and Exchange Act provides: "No objection to [a] . . . rule of the Commission . . . may be considered by the court unless it is heard before the Commission or there was reasonable grounds for failure to do so." 15 U.S.C. § 78y(c)(1) (1976). The Clean Air Act provides: "[O]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment . . . may be raised during judicial review." 42 U.S.C. § 7607(d)(7)(B) (Supp. IV 1980).

[565] If the petitioner's interests were represented, then he should bear a relatively high burden of showing that the negotiation group failed to consider a matter central and relevant to the rule and that there is a substantial likelihood that the rule would be significantly different if the matters had been considered. *Supra* text following note 561.

[566] *See supra* note 550 and accompanying text (discussing "good cause" requirement for not publishing proposal).

[567] *See supra* note 91 and accompanying text (discussing political legitimacy of rulemaking).

[568] 407 F.2d 330 (D.C. Cir. 1968).

*Park, Inc. v. Volpe*.[569] In *Automotive Parts* the paramount objective of judicial review was to determine whether rulemaking was carried out in a manner calculated to negate dangers of arbitrariness and irrationality.[570] In contrast, in *Overton Park* the Supreme Court required a "searching and careful" review of the agency decison to be based on the full administrative record available at the time of the agency decision.[571] A rule developed through a negotiation process is the result of a consensus of interested parties. The negotiation process guarantees that the concerns of interested parties are addressed, thereby eliminating the need to review the entire factual basis of the agreement. Therefore, judicial review of the factual basis of the negotiated rule need only consider the possibility of arbitrariness and irrationality.

### J. NONDELEGATION DOCTRINE

Courts and public officials periodically opine that it is inappropriate for an organization consisting primarily of private citizens to wield regulatory power. Therefore, they disapprove of regulatory decisions based on the recommendations of such a group.[572] The starkest example of such hostility arose when the Supreme Court rejected the innovative approaches of the New Deal.

The Supreme Court, in *Carter v. Carter Coal Co.*,[573] considered a statutory provision that authorized representatives of coal producers and coal miners to set maximum hours and minimum wages.[574] In a brief and powerful analysis of the legality of the delegation of power to the private group,[575] the Court held that the power to regulate an industry cannot be delegated to a private group because the authority to regulate "is necessarily a government function."[576]

Courts also have invalidated regulatory programs that rely on licensing boards that draw their members from the regulated activity because the composition of the board itself reflects a bias against particular interests. For example, in *Gibson v. Berryhill*[577] an optometry licensing board, consisting solely of private, practicing optometrists, was precluded from adjudicating charges of unprofessional conduct against optometrists employed by a corporation.[578] The Court reasoned that the board's substantial pecuniary interest in eliminating corporate optometrists precluded it from evaluating unprofessional conduct in an unbiased manner.[579]

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[569] 401 U.S. 402 (1971).

[570] 407 F.2d at 338.

[571] 401 U.S. at 420; *see also* United States v. Nova Scotia Food Prod. Corp., 568 F.2d 240, 249 (2d Cir. 1977) (judicial review of informal rulemaking must be based on whole record); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 402 (D.C. Cir. 1973) (reviewing court must consider whether rulemaking based on consideration of relevant factors), *cert. denied*, 417 U.S. 921 (1974).

[572] *See* P. HARTER, *supra* note 178, at 44-46 (discussing agency views on delegation).

[573] 298 U.S. 238 (1936).

[574] *Id.* at 278-83.

[575] *Id.* at 311.

[576] *Id.* For a discussion of the nondelegation doctrine, see generally Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L.J. 650 (1975); Jaffe, *Lawmaking by Private Groups*, 51 HARV. L. REV 201 (1937). More recently, following the evolution of the regulatory state, the United States Court of Appeals for the Fifth Circuit was concerned with reliance on recommendations of private consultants. *See* Aqua Slide 'N' Dive Corp. v. CPSC, 569 F.2d 831, 843-44 (5th Cir. 1978) (court not as deferential to opinions of private consultants as to expertise of government regulatory agency).

[577] 411 U.S. 564 (1973).

[578] *Id.* at 578.

Despite these expressions of concern over delegation of government power to private groups,[580] there are many examples in which a board with some kind of regulatory authority is composed of individuals that are privately employed and that are members of the board because of the interest they represent in their private employment. For example, regulatory authority has been given to state pollution control boards consisting of diverse representatives[581] and to private organizations for the licensing of professions.[582] A Professional Standards Review Organization[583] (PSRO) consisting of practicing physicians in the private sector is authorized to make many regulatory decisions concerning the provision of health care services, including the development of local norms of care, the determination of medical necessity, and the quality of health care services for purposes of federal payment.[584] The Securities and Exchange Act authorizes self-regulation of the securities market, including the development of rules designed to prevent fraudulent manipulative acts and practices and the discipline of members who fail to conform to the rules.[585] Both the PSRO schemes[586] and the Securities and Exchange Act authorizations[587] have been upheld as legitimate exercises of power against the challenge that they constituted an impermissible delegation of authority to a private group. In each of these cases, although the private board was entrusted with substantial authority, the agency had the final authority.

The regulatory negotiation scheme described herein would grant final authority to the agency. The agency, however, would act on the basis of the group's recommendations unless the agency had good cause for not doing so.

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[579] *Id.* at 578-79.

[580] The cases that invalidate the private exercise of regulatory power indicate that care must be taken to avoid building in a structural bias. For example, in *Carter* the Court concerned itself with the parties whose interests were not only unrepresented on the code-setting panel, but whose interests also were adverse to those who did participate in the rulemaking. 298 U.S. at 311. Moreover, the parties that did not participate were not given a viable opportunity to escape the imposition of the code. *Id.* Similarly in *Gibson* the private panel was hostile to the interests of the petitioner. 411 U.S. at 578-79. Thus, both cases stand for the proposition that it is essential to include the diverse interests that will be affected and that the process by which the ultimate decision is made must afford parties the opportunity to present their views before they may be bound by the decision of the private group.

[581] Vaughn, *State Air Pollution Control Boards: The Interest Group Model and the Lawyer's Role*, 24 OKLA. L. REV. 25, 25-52 (1971) (discussing the concept of "interest" in state air pollution control boards).

[582] *Cf.* Friedman v. Rogers, 440 U.S. 1, 18 (1979) (upholding petitioner's right to fair and impartial hearing by optometry board); Liebmann, *supra* note 576, at 665-71 (discussing inappropriateness of unqualified nondelegation doctrine).

[583] 42 U.S.C. §§ 1320c to 1320c-22 (1976 & Supp. IV 1980) (discussing professional standards review).

[584] *Id.* § 1320c-4(a)(1) (discussing duties and functions of PSRO).

[585] Maloney Act, 15 U.S.C. § 78o-3 (1976).

[586] *See* Association of Am. Physicians & Surgeons v. Weinberger, 395 F.Supp. 125, 140 (N.D. Ill.) (PSRO not unconstitutional delegation of authority to private organization because private organization may perform government function as long as administrative scheme provides hearing on organization's determinations), *aff'd*, 423 U.S. 975 (1975).

[587] First Jersey Security, Inc. v. Bergen, 605 F.2d 690, 697 (3d Cir. 1979) (upholding constitutionality of Maloney Act), *cert. denied*, 444 U.S. 1074 (1980); Todd & Co. v. SEC, 557 F.2d 1008, 1012 (3d Cir. 1977) (Maloney Act not unconstitutioanl delegation of power because SEC has power to disapprove association rules; SEC must make de novo findings aided by additional evidence if necessary; and SEC must make an independent decision on violation or penalty).

Because the government agency conducts the final review and makes the decision, the authority is not delegated to the private group.[588] The agency would have greater control over the ultimate regulation than the Department of Health and Human Services has over some determinations of a PSRO, and about the same authority the SEC has over determinations made by a private, self-regulatory body. Finally, those affected would have an opportunity to participate by presenting their views on proposed action. The structure of the regulatory negotiation process is such that it would sustain a challenge of institutional bias such as that used to invalidate a state licensing scheme. Thus, the regulatory negotiation process would not be an impermissible delegation of government authority to a private group.

### K. REGULATORY IMPACT ANALYSIS

A regulatory negotiation process would fulfill many of the functions that are provided by a Regulatory Impact Analysis[589] (RIA). An RIA aids an agency in determining that its action is based on adequate information concerning the need for and consequences of proposed actions; that potential benefits to society outweigh costs; that the net benefits to society are maximized; and that the alternative regulatory approach chosen involves the least net cost to society.[590]

The very process of negotiation fulfills most of those functions. First, the parties will act as a group only if they believe they have adequate information. Further, the purpose of negotiation is to adjust the regulation to fit the respective interests so that the respective benefits are Pareto optimal.[591] Thus, if regulatory negotiation fulfills its function, an RIA would be unnecessary.

The RIA is largely an analytical surrogate designed to aid an agency in replicating the kind of decision the parties would make if they were permitted to make the kind of trade offs that would be done in the process of a regulatory negotiation. To that extent, requiring an RIA of a negotiated regulation would be superfluous. Moreover, requiring an RIA would reduce some of the significant benefits of the regulatory negotiation process because the analysis would consume valuable time and resources in developing the factual and analytical material that may not be necessary for an enlightened decision by the parties.

For example, the National Electrical Code was developed by means of a consensus process. Those that developed the Code were forced to make the careful value judgments that an RIA is designed to simulate, such as trade offs between costs and fire safety. These trade offs are reflected in the provisions that authorize the use of nonmetallic sheathed cable in individual dwellings and commercial establishments, but not in places where large numbers of people gather, such as restaurants or theaters.[592] The prohibition requires the considerable additional expense of more sophisticated wiring techniques, but results in reduced exposure to fire and electrical malfunction. Negotiating a safety code requires an informed judgment about the trade off involved, but there is no "right" answer. Competing interests have their say, analysis is developed to the extent necessary, and a judgment is made.

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[588] *Cf.* Relco Inc. v. CPSC, 391 F. Supp. 841, 845 (S.D. Tex. 1975) (final agency action must be made or ratified by Commission and cannot be delegated to subordinate).

[589] Exec. Order No. 12,291 § 3, 3 C.F.R. 127, 128-30 (1981).

[590] *Id.* §§ 2, 3, 3 C.F.R. 127, 128-30 (1981).

[591] *See* M. INTRILIGATOR, MATHEMATICAL OPTIMIZATION AND ECONOMIC THEORY 259 (1971) (Pareto optimal situation one in which person can be made better off without making others worse off).

[592] NATIONAL ELECTRICAL CODE § 336-(c)(3) (National Fire Protection Ass'n 1975).

A code provision that involved the careful judgments similar to those of an RIA concerned the maximum allowable distance from the door of a room to a fire exit in a building.[593] Drafting such a provision requires sophisticated judgment having financial implications of hundreds of millions of dollars. Vast amounts of data may be generated in the resolution of that question, but in the end each competing interest presents its case and an informed compromise accommodates those competing interests. The function of an RIA is to make an informed decision so the overall interests can be maximized. The clash of interests in the participatory decisionmaking process of negotiations effectively serves such a function.

### L. BENEFITS BEYOND AGREEMENT

Even if the parties are unable to reach agreement on all issues, the regulatory negotiation process may have significant benefits. Because the areas of disagreement will be narrowed the issue will be better defined. The resolution process, whether regulatory, legislative, or judicial in nature, can focus on these narrowly drawn issues. Moreover, to the extent that the negotiation process reveals true interests as opposed to initial positions, those interests can be taken into account in the subsequent process. Thus, the regulatory negotiation process will streamline the subsequent regulatory process by enabling the decisionmakers to focus on the true issues and interests in dispute.

Participants in some of the environmental negotiations have found that working together toward a decision can bring the parties closer together so they develop an ongoing working relationship.[594] That relationship in turn can enable them to work out disputes among themselves as opposed to resorting to a more intensive adversarial process. Thus, the initial working relationship may have established the norms against which subsequent dealings were conducted. Even if *no* agreement is reached on a proposed regulation, the definition of the issues involved and the establishment of a forum in which the parties may work together is alone a substantial benefit.

### M. POSSIBLE ADVERSE CONSEQUENCES

Regulatory negotiation does have possible adverse consequences that must be considered. One frequently expressed concern, with respect to an agency's participation in the development of voluntary standards, involves agency participation in regulatory negotiation. In developing voluntary standards, the agency's staff member whose expertise makes him attractive to the committee writing the standard is also relied on by the agency in determining whether the standard meets the agency's regulatory needs.[595] The fear, of course, is that the agency representative would be unable to make a balanced judgment concerning the appropriateness of using the standard for regulatory purposes.[596] Those concerns are reduced in the regulatory negotiation context because the agency's representative would concur in the outcome. Moreover, the official participates throughout the process and, therefore, is in a position to explain to senior management the basis and purpose of the proposal. Thus, the decision of the agency concerning the regulatory proposal would be whether it conforms to existing law and policy, not whether its technical basis is sufficient to sustain judicial review.[597]

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[593] For example, the maximum allowable distance from the door of a hotel room to the nearest exit is 100 feet. NATIONAL FIRE PROTECTION ASSOCIATION, LIFE SAFETY CODE § 11-2.2.6.1 (1976).

[594] Cormick Interview, *supra* note 167.

[595] Two other concerns exist. First, agency participation in a standards writing organization would be a governmental interference with what is essentially a private enterprise. Second, some people may

Another fear is that the agency would lack the technical ability to keep up with the private sector experts during negotiations and, thus, would be unable to participate as an informed member of the negotiation process.[598] This concern is directed more to the quality of agency participation than to the negotiation process itself. The regulatory negotiation process presupposes that an agency will issue a regulation; that, in turn, requires the agency to be informed before it can even consider issuing the regulation. If the agency lacks its own expertise, it could hire a consultant, the services of another agency, or a temporary employee. Alternatively, the agency could develop its own expertise through research. The agency must be aware that its full participation in negotiations would require it to be able to identify the relevant issues and to know what factual material is reasonably necessary to resolve those issues. The danger always exists that the agency would be the slave of the private parties if the agency does not take that precaution, and such subservience clearly would be inappropriate.

The greatest concern over regulatory negotiation at this stage, however, is undoubtedly procedural. Will regulatory negotiation work, or will it merely add another layer to an already too protracted process? The fears include the following.[599] (1) The use of a convenor may mean that yet another agency becomes involved in the regulatory process with the inherent opportunity for delay and confusion over the coordination between it and the regulatory agency. (2) The agency may be reluctant to lose control over the process.[600] (3) The agency may believe that it is in a better position to assemble the negotia-

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believe that the agency must adhere to the decision of the standards writing organization simply because an agency member was present during deliberation. *See supra* note 352 (discussing possibility that agency not participate in development of standard when agency not called on to review standard).

[596] *See* Employee Membership and Participation in Voluntary Standards Organizations, 16 C.F.R. § 1031.5(a)(b) (1981) (discussing participation criteria that exclude those who give advice or make decision concerning standards); 1 C.F.R. § 305.78-4(1)(a)(1981) (agency employee who serves on committee developing voluntary consensus standards should not participate in agency decision to adopt or revise standard).

[597] Senior officials would, of course, review the technical basis, just as they do when a regulation is forwarded to them after being developed internally. The staff member that participated in the development of the negotiated regulation should have been in contact with senior officials and technical staff throughout the process to ensure the proposal's acceptability.

[598] *Cf.* Administrative Conference of the United States, Recommendation 72-4(B), 1 C.F.R. § 305.72-4(B) (1981) (expressing fear that overreliance on negotiation may inhibit development of adequate staff).

[599] Many of these fears surfaced in response to The Regulatory Mediaton Act of 1981, S. 1601, 97th Cong., 1st Sess., 127 CONG. REC. S9328 (daily ed. Sept. 9, 1981), which embodies many of the principles discussed above.

[600] Stewart, *supra* note 112, at 1346.

tors.[601] (4) The process of assembling the group may itself become mired in delay and bureaucracy.[602] (5) Identifying the appropriate parties as well as knowing when to exclude those who are only tangentially involved may be difficult. (6) The parties themselves may have difficulty in selecting representatives. (7) Squabbles may develop over the decision to use a negotiation process or over who participates. (8) The process may not reduce the time and resources necessary for decision. (9) The parties may be unable to reach a decision.[603] (10) The agency may reject the offering and make fundamental changes or begin anew. (11) Courts may strike down regulations because of failure to include some party or to develop sufficient factual material.

Each of these concerns is legitimate because virtually any of them could have a significant adverse effect on the viability of the regulatory negotiation process. These fears, however, might not materialize if the process is approached carefully. Indeed, the various aspects of this proposal were designed to minimize the chances of these problems developing. Upon analysis, the fears appear exaggerated.

## CONCLUSION: WORTH A TRY

Regulatory negotiation holds promise for success when the issues are relatively well defined, when there are a limited number of parties with sufficient power to prevent the others from emerging victorious, and when it is inevitable that some decision is imminent.[604]

As one participant in an environmental negotiation said, there is no "magic" in the process, but it was better than going through the traditional battle.[605] As in the litigation context, the problems of rulemaking will not vanish under a negotiation approach. Nevertheless, approaching the question through negotiation and reaching a consensus is likely to be, under the appropriate circumstances, better than the current hybrid process.

Although agencies could carry out a form of regulatory negotiation under current law by empaneling an advisory committee, the full benefits of the regulatory negotiation process could probably not be achieved through such devices. The Federal Advisory Committee Act requires open meetings that are controlled by the agency; the parties should be able to close the meetings when appropriate. Moreover, it is uncertain how a court would react to ex parte communications during the negotiation process, or challenges to a negotiated rule by interests that sat out the process or by negotiation participants that wished for more participation than they received in discussions. In addition, the agency may fear a stringent form of judicial review of underlying facts akin to the review of hybrid rulemaking because the negotiation process might not generate a record suitable for such a review. These doubts over the court's reaction could inhibit the full use of the negotiation process.

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[601] Miller Letter *supra* note 356 (comment of Federal Trade Commission on The Regulatory Act of 1981, S. 1601, 97th Cong., 1st Sess., 129 CONG. REC. S9328 (daily ed. Sept. 9, 1981)). Chairman Miller criticized the amount of responsibility the Act would give ACUS and the amount of power a unanimity requirement would give the negotiators). *Id.*

[602] *Id.*

[603] This is the classic concern with any decision process that gives an interest a veto. D. MUELLER, *supra* note 516, at 215 (critics of unanimity fear costly impasse). Professor Schuck also expressed this concern. *See* Schuck Letter, *supra* note 341 (unanimity requirement places too much emphasis on producing single agreement and leaves too much power with idealogues).

[604] These conditions are derived from experience with successful negotiation in analogous situations, in which many of the parties were skeptical of its efficacy. *See supra* notes 174-238 and accompanying text (describing various current procedures analogous to regulatory negotiation).

[605] Danielson Interview, *supra* note 162.

Thus, regulatory negotiations could best be conducted pursuant to a statute authorizing agencies to use the proposed process, at least on an experimental basis. There would be little to lose from such an experiment because there is ample opportunity in the process to protect against abuse or unforeseen problems.[606] Moreover, the potential theoretical benefits of negotiation are attractive. Experience with negotiating solutions to complex policy questions indicates that, at least in some circumstances, many of those benefits can indeed be realized. The malaise of administrative law, which has marched steadily toward reliance on the judiciary to settle disputes and away from direct participation of affected parties, could be countered with a participatory negotiation process. Regulatory negotiations would provide the legitimacy currently lacking in the regulatory process.

At the very least, regulatory negotiation is worth a try.

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[606] Such an experiment would test whether the fears expressed above are real or imagined. It would be important, however, that the process not be taken lightly simply because it is an experiment. It would be essential that the parties set out to prepare a regulation, and that they not act as though they were guinea pigs.

**Regulatory Negotiation**

# Experienced Practitioner Offers Guidance To Participants In Negotiated Rulemaking

*This is the first of a two-part article by Philip J. Harter on what a participant in negotiated rulemaking, at the federal or state level, should know about effective use of the process. Harter is one of the pioneers in the development of this form of ADR: his research on regulatory negotiation led to the 1982 recommendation by the Administrative Conference of the U.S., 1 CFR 305.82-2, that induced a number of federal agencies to consider using negotiations in formulating proposed rules; subsequently, he has acted as facilitator in many of these proceedings.*

Negotiated rulemaking, as readers of this *Report* well know, is a process by which representatives of the interests that would be substantially affected by a regulation assemble into a committee to negotiate the terms of the rule. The agency authorized to issue the rule participates in the deliberations and usually agrees that if the committee reaches consensus it will use the proposal agreed upon as the basis of its notice of proposed rulemaking. After publication of the notice, the agency follows whatever procedures it would normally use when issuing a rule, so that members of the public may participate in the rulemaking.

What follows are some practical reflections on participating in regulatory negotiations, or "reg-negs" as they are often called, by one who has studied the process and has served as the convenor-facilitator-mediator in several of them.

## Overall Purpose

Regulatory negotiation is a powerful means of developing complex rules that have a significant factual basis, but are not "driven" by the facts, and that have become controversial. Since reg-neg is closely akin to a political process by which competing interests are accommodated, it addresses not only the rule in question, but also the underlying political controversy. As a result, the end result is usually more than just a rule, and also includes a means for taking difficult political issues into account in a way that still meets the mandates of the underlying statute.

The aim of the process is an agreement — a "consensus," however defined — on the terms of a proposed rule. But even if the parties are unable to reach closure, the process may, and usually does, have important benefits. Several participants have said that the working relationships that were established during the negotiations gave them an understanding of the other side and were helpful in the future. Moreover, the negotiations usually significantly narrow the issues in controversy so the parties can focus on those that really separate them. The negotiations will also frequently define the framework or provide some of the basic structure of the rule that is ultimately issued by the agency. Finally, in several instances, the parties were not able to agree on an outcome, but did agree to have the agency "arbitrate" the matter within the confines of the discussions. Thus, it is a gross mistake, as is sometimes done, to characterize a reg-neg that does not reach agreement as a "failure"; while not entirely successful, they still provide sufficient benefits so that the participants almost always say the process was worthwhile even without the final concurrence.

## Choosing Reg-Neg

The first step in a regulatory negotiation is for someone to decide that the best way to develop the rule may be to use reg-neg. Usually, someone in the agency that will ultimately issue the rule makes that initial determination. But, in a couple of instances, people outside the agency have thought that it would be appropriate to use the process for a particular rule. Representatives of their interests explained to the agency officials who would be responsible for developing the draft rule why they thought reg-neg would be the preferred route.

One strong argument used in such cases was that the agency itself would likely be relatively stymied in issuing the rule because of the controversy surrounding it. Reg-neg is a way of addressing those disputed issues. It is also a way of tapping technical and practical expertise that is often difficult for the agency to obtain.

If you are in such a situation, you have a better chance of persuading the agency to use the process if several parties who are customarily adversaries join in the request; each may want to use the process for a different reason — one might want the rule issued faster than would happen under the traditional process; another might want uniformity; another might want ease of administration — but all may concur in the recommendation of the process.

Once the agency has made a preliminary decision that it *may* be appropriate to develop a rule by means of regulatory negotiation, it

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will usually retain a neutral "convenor" to assess the situation and make a recommendation whether or not to use the process. The convenor's job is to determine what issues are likely to be raised by the rule and which parties would be sufficiently interested in it to need to be represented on the negotiating committee. The convenor contacts representatives of those interests to determine whether, all things considered, they believe they would be better off by using negotiated rulemaking than by going the traditional route.

## Convening Stage

The convening stage needs to be taken quite seriously by potential participants. It is the time when your organization or client needs to answer, at least preliminarily, a number of important questions about participating. Foremost is a determination of what you really *need* out of the rule: are there some particularly critical issues that might be raised? Sometimes these issues are such that you might legitimately feel that you simply could not compromise a whit on them, so that you would be unable to participate if it meant doing so. Addressing the issues in controversy in a straightforward, honest manner is difficult, but needs to be done at this stage. Remember, however, that while some issues seem awfully large initially, there are frequently alternative means of achieving the desired end in ways that do not necessitate compromising matters of principle.

You should also consider that negotiating may be viewed as highly desirable since it affords each party the opportunity to present its views, needs, and arguments *directly* to the others. The process thus affords you and each party the ability to trade on the basis of the arguments and needs of others.

If you opt for participation, the next practical questions to be considered are whether you will be able to assemble a caucus that will be able to work together in developing a common approach, or whether your overall "interest" is splintered in such a way that it would be difficult to choose even a couple of people that would adequately represent your needs. You should also consider what will happen if the committee is unable to reach agreement: will the negotiations affect the timing of the regulation; will they affect the outcome, since the agency and the other parties will have heard the discussions; will important arguments be lost? What are the prospects for success, however defined, since that will have an important bearing on whether you think it is worth participating? What about the cost of participation?

*" Since reg-neg is closely akin to a political process by which competing interests are accommodated, it addresses not only the rule in question, but also the underlying political controversy."*

You should get an idea from the convenor just what is anticipated in terms of the schedule and resource demands, and then make a determination as to the costs of participation and how those resources will be developed. All of which is to say that this is the stage where you carefully define what is your best alternative to a negotiated rule — in negotiating parlance, your "BATNA" (best alternative to a negotiated agreement). For many rules it is likely that you will decide that you may be able to achieve more by participating than by the traditional route. Rules that emerged from the process thus far have been quite stringent but impose practical, workable obligations that meet the needs of the regulated industry.

A neutral person serves as the convenor precisely so that the affected parties can be open and honest in assessing their interest in participating. A party does no one a favor by expressing an interest in going forward with a regulatory negotiation simply to avoid being regarded as a nay-sayer. First, if a major party does not want to participate, the convenor will report that fact without attribution so that blame for not going forward will not be pinned on any one party. Second, the reluctance of any participant is likely to emerge later, during the negotiations, and other parties may justifiably be irked that they have expended significant resources when an agreement was not likely and one of the parties should have known it. Thus, being honest with yourself and the convenor is important.

The convenor will also make a preliminary determination as to what issues must be resolved in the negotiations and what parties must be there. This raises a couple of points. First, the convenor, with the assistance of the parties, has to decide whether the issues raised in the negotiation are part of a broader problem. If they are, it may be that either that problem cannot be resolved through negotiations or if it can, other parties will need to participate who might not do so if only the narrower rule is considered. Secondly, the convenor will need to determine whether representatives of all of the affected interests can be selected and whether they want to participate.

Actual representatives are always chosen by the interests themselves. A number of factors need to be borne in mind when deciding who will represent your interest. The person needs to have sufficient time to dedicate to the process. Doing so requires both the time to attend and the time to prepare sometimes complex analyses. Negotiations are always difficult if the participants are unable to make decisions and have to constantly check back with their constituencies. Thus, the representatives need to have sufficient stature within the interest they represent to be able to make difficult decisions with some degree of confidence that the interest will adhere to them.

Moreover, the person chosen should also be something of a risk-taker, who is able to make decisions quickly. Finally, the representative and the organization need to have unfettered access to those who have necessary technical information and those within the interest whose views must be factored into the negotiations. An indecisive participant inevitably has difficulty making and gaining its points.

## Organizational Meeting

One of the tasks that must be undertaken at the first meeting is to determine the ground-rules by which the negotiating committee will operate. The discussion of the protocols helps make the parties comfortable with the process and clarifies how it relates to traditional rulemaking. It also helps the parties relate to each other, since in the very process of agreeing on the ground rules, they find they can indeed negotiate with their traditional adversaries.

Typically, the convenor will draft protocols based on earlier regulatory negotiations that can be adapted for use in the one at hand. If you have residual concerns or doubts about how these procedures will work, make sure they are raised at this stage.

During the organizational part of the negotiations, an initial, informal cut will usually be made with respect to the schedule: how long the process is expected to take; how many meetings there will be; in what order the issues will be considered and why; what happens if no agreement is reached; if there is a deadline, is it real, or can it be extended if suitable progress is being made? These questions can affect how you and others will participate.

## Minutes

Since federal negotiations will be conducted under the Federal Advisory Committee Act, 5 USC App I, minutes must be kept of the meetings. Comprehensive, detailed minutes can help memorialize what was said and what was decided at each meeting. While minutes can certainly help move the process forward, they can have two highly adverse effects. One is that if the record made in this fashion is intended to capture everything, then the parties will want to make sure that it is very accurate and that concern can result in bickering that builds dissension and consumes vast amounts of precious time. Secondly, the detail of who said what may lock participants into positions prematurely.

> *"Rules that emerged from the process thus far have been quite stringent but impose practical, workable obligations that meet the needs of the regulated industry."*

Unless the issues and potential solutions are relatively well defined, it is often advisable to have the notes be in outline form, stating only the general propositions that were discussed without attribution. In that way, the ideas can be captured without inhibiting creative discussion. The group as a whole needs to decide just how detailed they wish the minutes to be, recognizing the inherent tradeoffs.

## Training

Some negotiated rulemakings have begun with a one-day training program. They are helpful in several ways. They provide an insight into the theory and practice of negotiations. That exercise helps build skills and removes some of the mystique for those participants who do not realize that, actually, they negotiate all the time. It also provides a common vocabulary that will prove useful during the course of the negotiations. But, you should not think that the one-day session will convert a novice into an expert negotiator. The brief training cannot provide many negotiation skills themselves. If you and your colleagues are unfamiliar with the vast literature on negotiation theory and practice, you might find it helpful to read up on it; most of the material is relatively inexpensive and easy to read, and yet provides helpful insights and strategies. For example, one book that has become a classic is R. Fisher and W. Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (New York: Penguin, 1986). Others are H. Raiffa, *Art and Science of Negotiation*, (Cambridge, Mass.: Harvard Univ. Press, 1985); H. Cohen, *You Can Negotiate Anything* (Secaucus, N.J.: Citadel Press, 1983); W. Zartman and M. Burman, *The Practical Negotiator* (New Haven, Conn.: Yale Univ. Press, 1982).

*Editor's Note:* Part two of this article will include a discussion of what participants should know about such "special parties" as federal agencies or congressional committees; guidance on consideration of factual and legal issues by negotiating committees; and general advice on approaching the actual negotiations. Harter concludes with remarks on the agreement that should emerge from the process.

**Regulatory Negotiation**

# Experienced Practitioner Offers Guidance To Participants In Negotiated Rulemaking

*This is the second of a two-part article by Philip J. Harter on what a participant in a negotiated rulemaking at the federal or state level should know about effective use of the process. Harter is one of the pioneers in the development of this form of ADR: his research on regulatory negotiation led to the 1982 recommendation by the Administrative Conference of the U.S., 1 CFR 305.82-2, that induced a number of federal agencies to consider using negotiations in formulating proposed rules; subsequently, he has acted as facilitator in many of these proceedings.*

*In the first part of the article, which dealt with the pre-negotiation stage, Harter described the overall purpose of regulatory negotiations and offered practical advice on whether or not to participate in the process, followed by suggestions on how to get the most benefit from the negotiating committee's convening process. This part clarifies the role of "special parties," such as governmental agencies, in negotiations, and considers what participants should expect from the mediator or facilitator. Suggestions about how best to approach the negotiations, the inevitable factual and legal issues, and the drafting of a proposed rule conclude the article.*

## The Agency As Party

The governmental agency charged with eventual issuance of the rule under consideration necessarily occupies a special place in the regulatory negotiations. In fact, it typically occupies three special places, and each role needs to be distinguished from the others. First, in its administrative role, the agency hires and pays the mediator and will frequently provide the logistical support for the negotiations. This relationship between the mediator and the agency should not be cause for concern. The duty of the mediator is to ensure that the parties are comfortable with the process and to facilitate communication among them to the end that an agreement is reached that is satisfactory to the participants; if the parties are dissatisfied with the mediator's performance, they can request that a new one be appointed. Thus, it would defeat the mediator's task if he or she were to favor the agency, or any other party, for that matter. But, if you do have concerns, raise them with the mediator and/or an agency official so they can be addressed.

The second role for the agency is to provide information and analyses. The agency will typically have access to staff or to consultants who are able to generate the data to be used in the discussions and to perform the various analyses that need to be done. In this role, the agency is serving as the staff of the committee as a whole, although to be sure, much of that activity may be in the form of supporting the agency's own negotiators.

The third role for the agency is as a party in interest. Since it is the agency that will be issuing the rule and it is the agency that will have to act unilaterally if the negotiations fall apart, it occupies the seat of the 800-pound gorilla: It is clearly a major party to be reckoned with. It is often helpful if the agency takes the lead in the negotiations by providing a first cut at the factual underpinnings of the rule and at resolving the issues into the outline of a rule. As discussed below, someone needs to take the lead, and since the agency has presumably been considering the rule longer than most of the other parties and has the wherewithal to perform the requisite tasks, that responsibility frequently goes to the agency, albeit sometimes by default.

The agency must recognize that it is treading a fine line in this area, however. If it takes a hard line, so that the parties' perception is that they must wrestle it away from an initial position, the free flow of ideas can be inhibited. Moreover, parties may be discouraged by the agency's statement that it is going to negotiate when it appears to them to expect prompt ratification of whatever it proposes.

On the other hand, an agency that is too timid and does not indicate where it stands on important issues can also inhibit the discussions because the parties will not know where a major party will come out in the end. In that situation, participants are likely to keep pressing their own views in an effort to carry the day. Thus, the agency needs to participate in the ebb and flow of the negotiations just like the other parties, but also to recognize that its special status may mean that it should "go first" in helping to develop the framework for the rule.

## The Executive and Congress

Two other special parties in rulemaking at the federal level are the Office of Management and Budget and the congressional committees

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with oversight or legislative authority over the relevant program. Negotiated rulemaking certainly does not exempt a rule from OMB review under Executive Order 12291, which provides that office with authority to review and clear all executive agency rulemaking. Thus, the parties need to bear in mind that OMB will continue to play its oversight role. They may want to make sure that someone on the committee is in touch with OMB so that its views can be incorporated into the consensus rule. The parties may also decide that if OMB has adverse comments on a draft consensus rule, each party to the negotiation will agree to support the rule when proposed in an effort to dissuade OMB of its adverse reaction. Since at present OMB is a strong proponent of the marketplace, one might expect that it would support a rule that almost by definition meets the "marketplace" test, since the parties "bought" it. But OMB has displayed some hostility towards regulatory negotiation recently and its endorsement cannot be guaranteed.

The role of Congressional committees in negotiation has varied. Sometimes the committee staff fears that the negotiated rule might not be what Congress "expected" when it passed the statute; sometimes they want to ensure that a constituent is on the committee, or at least in a position to have his or her views seriously considered; sometimes, indeed usually, they are not concerned about a particular matter but do want to be kept informed. In all of these cases, someone needs to make sure that the views, thoughts, and concerns of the committee are factored into the negotiations. Probably most typically, the agency keeps abreast of congressional developments: it is the agency that must live with the committees day in and day out; it is the agency that will take any heat for straying; and it is the agency that has the congressional liaison staff. Sometimes the relationship between the agency and Congress is not open to candid discussions of the regulatory issues, and the mediator plays the role of coordinator and offers a neutral appraisal of the issues and potential outcomes. The mediator can also carry back to the relevant parties any strong views from the Hill.

## The Mediator or Facilitator

Once the negotiating committee's meetings get under way, you can expect the mediator or facilitator to be the 'traffic cop' of the meetings, so that they run smoothly. Beyond that, the facilitator/mediator is an advocate of the process itself.

> *"Remember that a mediator who presents the needs of another party in tepid terms will likely do the same for the views you hold dear."*

The neutral serves as the metronome, establishing the pace of the meetings and the negotiations. A related function is to help record the progress of the meetings. Newsprint tacked up on the walls is a common ingredient of virtually every regulatory negotiation. But, like minutes, detailed charts have their good and bad qualities. They are important for keeping track of what was decided, even if only in the form of a list of issues to be considered in the future or of alternative ways of approaching an issue. Often, however, what is most important in a particular discussion is the broad, general concept. Trying to achieve premature precision — an effort which frequently accompanies writing — can curtail the evolution of an idea. While leaving the import a little vague can sometimes be disquieting, recognize that if a good idea comes up, it will usually develop; codifying it early may cause some to reject it for its details, not its essence.

Although the terms mediator and facilitator are often used interchangeably, a facilitator usually only runs the meetings and other closely allied functions. A mediator, on the other hand, generally also works with the parties in between the meetings and becomes more involved in the substantive issues, not as one who has any role in deciding them, but in helping the parties address them. The mediator keeps the parties oriented towards the goal, reminding them what might happen without an agreement, shuttling messages and ideas back and forth in a way that enhances communication by providing feedback on the reactions of the other parties and offering educated guesses as to what may or may not work.

The mediator also provides a "plausible denial," in case an idea doesn't fly. For example, someone may think of an idea that meets various needs, but may be reluctant to raise it directly. To avoid being trapped, the party may want the mediator to discuss the suggestion with the other parties but without attribution. If the proposal does not meet with response, no one is bound, even informally, by what was said; if the idea does work, then everyone can perfect it.

The mediator helps frame the issues, both within the committee as a whole and within the individual caucuses. He or she asks "what if" as a way of generating ideas and potential solutions to the issues. The mediator often needs to be a forceful advocate, not for the view of any particular party but to ensure that the issues that are important to a party are considered seriously by the others. Remember that a mediator who presents the needs of another party in tepid terms will likely do the same for the views you hold dear. Moreover, a mediator's throwing out an idea rather forcefully can serve the important role of precipitating a decision by the group that would otherwise dance around an issue, each one afraid to go forward. Thus, expect the mediator to take an active role and to engage in the ebb and flow of the discussions in a way that raises the issues that must be dealt with if a rule is to emerge.

In order to help the mediators play that role, it is important to keep them informed on what you really need and of your ideas of how to achieve that need. You will help them frame the issues and raise ideas or tell the others what they think you may or may not be able to accept. If you are disingenuous or otherwise not forthcoming with the mediator, it can set you and the negotiations back, and sometimes engender bitterness on the part of other participants who were working on a mistaken notion of what you wanted. If the information you need to convey to the mediator is particularly sensitive, be sure to point that out so that it will be suitably protected.

## Factual Issues

In the typical regulatory negotiation the factual issues will be intertwined with policy matters. In the negotiations, there is no separate or distinct phase or process for resolving the underlying facts. But the approaches and responsibilities differ.

Sometimes it is important to have a common understanding about the facts so the parties can focus on their differing views as to the consequences of those facts. In such a case, if the facts are disputed, the committee might consider establishing a means for a fairly authoritative resolution of the matter.

In all cases, it is human nature to resolve doubt negatively. Thus, if you assert or assume a particular factual premise for a position, other parties may be reluctant to accept your policy position unless you can also provide them with enough data to bolster the underlying facts; without that support, the others may assume, reasonably or not, that the foundation is not sufficient to carry the proposition. The lesson is that you should at least offer to provide the data if needed.

Several methods have been used to develop the factual background of issues confronted in negotiated rulemakings. You should concentrate on getting agreement on how this is to occur in the one in which you are participating, no matter how that was done before. Typically, the committee will need to develop a "path" which defines the order in which the technical matters will be developed and discussed. As discussed above, the agency will frequently take the lead in generating the technical information. The other parties will then react, critique, and present counter data. Sometimes, however, other parties have better access to relevant data and hence will either provide it voluntarily or will be assigned that task by the group.

*"Since it is the agency that will be issuing the rule and it is the agency that will have to act unilaterally if the negotiations fall apart, it occupies the seat of the 800 pound gorilla: it is clearly a major party to be reckoned with."*

Sometimes the committee will have an independent expert as a member, and that person will be responsible for developing a neutral technical position that will be the basis of discussions, or for conducting relevant tests or reviews. The committee can also retain such an expert as a consultant. In at least one negotiation, the agency had a consulting firm available to address complex technical issues that were raised during the deliberations.

In several negotiations, some of the parties were at a technical disadvantage and felt that their inability to assess the factual material inhibited their participation. To meet these concerns, a consultant was retained to provide the requisite expertise to all of the participants.

Typically, the committee will establish "work-groups" to flesh out the technical issues and details that are identified and bounded by the committee itself. These work-groups often consist of people who are on the technical staffs of the interests represented on the committee. They are usually open to anyone who wants to participate. Thus, work-groups will frequently have different people participating than the negotiating committee, although the membership overlaps somewhat. The work-groups are not authorized to resolve any issue; rather, the output of the work-group is a report to the committee for use in developing the consensus role.

## Approaching Negotiations

The first requisite of participating in a negotiated rulemaking is to define, or at least develop, an insight into your needs or interests, within the ambit of what is authorized by the applicable statute. Your next task is to compare what you found with what is likely to happen in the absence of a negotiated rule. Only if you know what you need can you determine whether a proposal — one of yours or one from another party — is in your interest. While that sounds perfectly trivial and obvious, this fundamental notion is often ignored. Too frequently a party will come into the negotiations advocating a particular approach, saying earnestly that it simply "must" have it. Yet, when the position is analyzed, it turns out that it is only a vaguely perceived means to achieving the party's real end and not the end itself. By defining what is needed, and not ways of meeting a vaguely perceived need, whole new approaches may be opened up that would otherwise remain closed.

For example, the stringency of a proposed rule may not be a major obstacle to compliance if enough time is provided or if an appropriate means of compliance is acceptable, but, without that definition, a party might argue strongly for a more lenient standard that may be unacceptable to others. By defining the real underlying interests, all the parties can strive to develop a rule that meets them.

Because of the way traditional adversarial rulemaking works, and because of the internal composition of some interest groups, defining the overriding need is often surprisingly difficult. Doing so necessitates a new kind of analysis and reconciling what may be competing internal needs. In such cases, it may be helpful for the affected interest to use a mediator inside its own caucus to help define the interests that will be presented in the negotiations.

Try to remember that participating in the actual negotiations is not an oral argument before a court or agency; you are not building a record. No points are scored for hard-line, extreme positions. "Positional bargaining," where you insist on a particular approach to the exclusion of all others, will not go far. A moment's reflection explains why: if your participation in the negotiations is based on intransigence, so will the others' be. If everyone hunkers down to their extreme, initial positions, there is no basis for negotiations and no agreement. Thus, the potential benefits of the direct, face-to-face negotiations in which the parties are able to actually participate in the decision will be lost. Defining your needs in a way that can be communicated to others is the way to achieve those ends.

When participating in the give and take of the discussions, it is helpful to throw out ideas, to play with approaches. The old saying, "if you want the job done right, do it yourself," applies in negotiations. If you want something that meets your needs, don't wait for others to do the writing; be a leader and come up with approaches that solve your needs but are within the realm of the plausible for the others. If your proposal is too extreme, if it does not pay enough heed to the others, it will not be considered seriously, and indeed it can injure your ability to float proposals in the future since the others may discount future offerings. If you are uncertain whether something is a good idea or not, say so up front when you propose it; the others will take it for what it is worth and not hold it against you. Tossing out ideas is a way of generating new approaches that might meet the respective needs of the parties.

> *"By defining what is needed, and not ways of meeting a vaguely perceived need, whole new approaches may be opened up that would otherwise remain closed."*

## How to Treat Options

When another party makes a proposal, do not reject it out of hand, saying it does not meet your needs. Make a counter offer: adapt it, build on it, so that it does meet your concerns. Counter by saying that you could accept if the others accepted something of concern to you, or that you could accept this or that part if something else is done. If you are accepting something only on the condition that something else happens, be sure to make that clear. Otherwise, some of the parties may think that the part you accepted is established but that the part upon which you conditioned your acceptance is still up for grabs; it may have a gravely adverse effect on mutual trust if at a later stage you have to repudiate the "accepted" part because the others were not willing to meet the conditions. Linking the two up front alleviates that difficulty.

One common problem in regulatory negotiations, as in other types of negotiations, is that parties sometimes think that simply because something was once proposed it remains on the table as an option. Thus, they seem to feel they can reject an idea when initially offered, but that if it subsequently appears that the proposal has become more attractive, they can then revive it and accept it. Such is simply not the case. The party that offered the proposition in the first instance may be unwilling to proffer it later. I have been in several major negotiations in which a party that rejected an offer at one point subsequently spent enormous efforts trying to retrieve it, in each instance unsuccessfully.

This has two important consequences. First, it makes it "safe" to throw out ideas. You can float a trial balloon and, if you subsequently decide that it is not in your interest, you can withdraw it. Since offers do not become options, no one can argue that you are acting in bad faith by saying that you will no longer go along with it. The second consequence is that when an offer is made, you need to decide whether it is attractive, grab it, and stake it out as at least a tentative given. It may disappear if you let it pass.

## Measuring Your Success

There are interesting variations between how parties view negotiations. Some will focus virtually exclusively on how much they are gaining as opposed to what might have been. Others look at what they are losing, as compared to their wish list. This difference is encapsulated in the mediator's saying that it depends on whether you view the cup as half empty or as half full. Those who view "the container" as half full do far better in the negotiations and, by accentuating the positive, are better able to sell the ultimate agreement to their constituencies. In negotiations, as in most other endeavors, the perfect — your wish list — is really the enemy of the achievable. Seeking everything may mean you are unable to determine when you are better off as compared to your BATNA — Best Alternative to a Negotiated Agreement.

A corollary of that is "do not try to win too much." A participant in a negotiation needs to recognize when its needs have been substantially met and not to put too much weight on achieving *all* the needs on the wish list. In simple terms, at the later stage of the negotiations, the marginal return to you is likely to be low whereas the marginal cost may be much higher to another party, especially if they feel they have already given a great deal; trying too hard to achieve that extra measure may force the other party to say "no," not only to that issue but to the whole package. The issue may become the straw that broke the camel's back, and after all, a camel is a horse designed by committee — the product of a negotiation.

## Structuring Issues

During the course of the negotiations, the committee and each caucus need to separate "core" from "wish" issues: the list of issues needs to be put into some kind of priority ranking. Some issues will clearly be far more important than others. The issues then need to be grouped into related categories. The relationship could come from a common factual background, a particular stage of production or control of the regulated substance, chronology, or whatever. Next, the committee needs to decide on a means for addressing the issues in some sort of sequence. To borrow from computer terms, a "path" needs to be developed that will guide the deliberations through the issues and their factual underpinnings.

The highly controversial issues — the guts of the rule — will frequently be discussed early, but in a hesitant way. Securing agreement, even a tentative, provisional agreement, on the core issue before the rest of the rule has taken shape is unlikely. Nevertheless, the discussion helps define the range of concern and begins to make the parties feel comfortable in discussing something that each of them is likely to feel uneasy about simply because so much is potentially at stake. The preliminary discussion also prompts the parties to begin mulling over ways of addressing the issue.

> *"Try to remember that participating in the actual negotiations is not an oral argument before a court or agency; you are not building a record."*

Several of the difficult, controversial issues are likely to remain unresolved until the end of the negotiations. That is only in part because making decisions on them is the hardest part of the negotiations. The other reason is that it is important to have multiple issues at the end so the parties can maximize their own interests. After all, the entire theory of negotiations is that what is important to one party is not as important to another. When it comes to the end, the parties can say, "I will give you what you really need if you will do likewise."

## Drafting the Proposal

A committee can raise issues and deliberate on their pros and cons, but it is difficult for a committee to write complex documents or to make an initial decision based on the discussions. It is usually better at reacting than at creating. Having someone prepare an initial outline of what a rule might look like, usually after some deliberations have taken place, is often helpful. The mediator might pull the ideas together, or one of the parties might do so. Whoever does the writing and whoever reads it needs to realize that the purpose of the document is to provide a framework for the discussions, a starting point. As before, everything in the document must be within the range of consideration by the committee; pushing an idea too far will be counter-productive. If the issues have not yet been "bounded" and the parties are still far apart, the document might reflect that situation, so the participants can begin bridging the gaps. The framework document might be highly abstract and abbreviated at first, as the nature of the rule begins taking shape. It will evolve and change as the negotiations progress.

The framework document serves to focus the deliberations of the committee. The members can react to its provisions and suggest ways that it should be changed. Major ideas should be developed in writing and distributed either informally, through the mediator, or directly, if a good working relationship between the participants has developed so that parties can come prepared to provide educated, thoughtful reactions to them.

## Legal Issues

Legal issues invariably arise in negotiations and must be squarely addressed. Some have argued that the negotiation process casts the agency in a position of being a "regulatory real-estate agent, whose true client is neither the buyer nor the seller, but the deal that can be struck between them." (R. Steinzor and S. Strauss, "Building a Consensus: Agencies Stressing 'Reg Neg' Approach," *Legal Times*, August 3, 1987, p. 16.)

Under this view, the agency feels free to ignore the law and accept whatever agreement emerges from the parties — Congress be damned. This may or may not be an interesting argument in the abstract, but it is decidedly not true for any negotiation with which I am familiar. In each, the agency and the parties were quite aware that they must operate within the bounds of the statute. The parties may, and frequently do, disagree over the "proper" meaning of the applicable law, but just because the agency dissents from a party's position should not be viewed as disregarding statutory dictates. A simple assertion that something is "not legal" is singularly unhelpful to the committee: it provides no basis for discussion to determine whether that particular view of the law is correct or, if the argument is plausible, whether there are ways to rectify the difficulty. If a legal issue arises, it should be resolved the way legal issues are customarily resolved in the absence of an authoritative court decision: the parties should prepare memoranda analyzing the subject, thrash out any disagreements they may have, and reach a shared view as to the acceptable range of what the law allows.

To be sure, the proposals that emerge from negotiations sometimes take unprecedented approaches that differ from traditional ones that were squarely contemplated by the statute's drafters. The advantage of negotiations is that participants are able to design a system that will, when considered as a whole, work better than the results of a more conventional process. If a camel is a horse designed by committee, it may work far better than a horse, depending on the terrain in which it operates. When crafting creative regulatory approaches, all participants must recognize that they have to stay within the confines of the applicable statute and be prepared to explain how they have done so.

> *"In negotiations, as in most other endeavors, the perfect — your-wish list. — is really the enemy of the achievable."*

## The Agreement

The quest of the enterprise of negotiated rulemaking is to reach agreement on an entire package. As such, to quote the philosopher Yogi Berra: "It ain't over 'til it's over." Thus, no decisions are final until the end and everything remains tentative, subject to change. What is needed is for the committee to get a *tentative* resolution of the issues as they evolve. The deliberations of the next issues can then be based on these provisional determinations. But these decisions can be revisited and adjusted as the negotiations evolve intc an entire package. You may not want a specific, identifiable agreement on the individual issues during the initial deliberations since their presence may reduce the flexibility to revisit individual matters as the negotiations continue.

The agreement is on the entire package taken as a whole, not on any of its constituent parts. It is best if the parties can agree on the actual text of a proposed rule and at least the substantial, substantive portions of the preamble. Even after a detailed outline is prepared and agreed upon, a vast amount of work is required to translate that consensus into regulatory language. Moreover, details inevitably arise during drafting that may have important consequences for how the rule will work in practice. Thus, it is recommended that the committee establish some means for developing the actual language, if feasible. One method that has worked well is to have one representative of each interest caucus sit down and review the draft.

All representatives need to consult their constituents and make sure their major concerns have been addressed in the proposal. The ground-rules or protocols will specify what "agreement" or "consensus" means for the particular negotiation. In some instances, unanimity is required; in others, each interest represented has to concur, but not each individual member of the caucus. The agreement may provide only that the committee recommend that the agency publish its proposal as a notice of proposed rulemaking, without more. Other agreements have provided that each party agrees not to challenge the rule and to support it by filing a memorandum with OMB or a court indicating that it concurred in the rule when considered as a whole.

The parties may, of course, be unable to reach agreement on the entire package. The committee could decide that the parts of the rule are so intertwined and dependent one on another that unless the representatives can agree on the entire package, they cannot agree on any of its parts. In that case, the committee would simply be dissolved and the agency would be left to its own resources to develop a rule unilaterally. But, since the agency participated in the negotiations, it may of course base its rule on parts of the committee's deliberations.

Or, the committee might decide that even though it could not reach agreement on the whole, it will trust the agency to resolve the remaining issues. In that case, the parties might still enter into an agreement, specifying the parts on which they agree to disagree.

## Conclusion

There seems to be a growing acceptance of negotiated rulemaking as a means of addressing complex, politicized issues. As the experience builds, participants feel more comfortable with the process. It is clearly a way of enabling interested parties to actually participate in the development of rules that concern them and to address their needs. At this stage, the major impediment would seem to be the resources required for some groups to participate fully.

# Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States

HENRY H. PERRITT, JR.*

I. INTRODUCTION AND SUMMARY .......... 1627
II. LEGAL AND POLITICAL BACKGROUND .......... 1630
  A. HISTORY OF THE NEGOTIATED RULEMAKING IDEA .......... 1630
OMITTED
  B. THEORETICAL FOUNDATION .......... 1636
    1. Dynamics of Regulatory Negotiation .......... 1636
    2. Characteristics of Interest Groups .......... 1639
    3. Characteristics of Regulatory Programs .......... 1641
  C. CRITERIA FOR NEGOTIATED RULEMAKING .......... 1642
    1. Countervailing Power .......... 1643
    2. Limited Number of Parties .......... 1644
    3. Mature Issues .......... 1644
    4. Inevitability of Decision .......... 1644
    5. Opportunity for Gain .......... 1645
    6. Absence of Fundamental Value Conflict .......... 1645
    7. Permitting Trade Offs .......... 1645
    8. Research Not Determinative of Outcome .......... 1646
    9. Agreement Implementation .......... 1646
OMITTED
III. THE BENZENE NEGOTIATIONS .......... 1647
  A. INTRODUCTION .......... 1647
  B. HISTORY OF THE REGULATION OF BENZENE BY THE OSHA . 1647
  C. DECISION TO NEGOTIATE .......... 1650
  D. ISSUES IN NEGOTIATION .......... 1651
  E. BENZENE AS A CANDIDATE FOR NEGOTIATED RULEMAKING .......... 1653
  F. INCENTIVES TO PARTICIPATE—IN GENERAL .......... 1654
  G. INCENTIVES FOR THE OSHA TO PARTICIPATE .......... 1655
  H. INCENTIVES FOR LABOR TO PARTICIPATE .......... 1655
  I. INCENTIVES FOR INDUSTRY TO PARTICIPATE .......... 1656
  J. DIFFERENCES AMONG THE INDUSTRY PARTICIPANTS AND WITHIN INDUSTRY CONSTITUENCIES .......... 1657
  K. INTRALABOR MOVEMENT DIFFERENCES .......... 1658
  L. NEGOTIATION PROTOCOLS .......... 1659
  M. THE NEGOTIATION PROCESS .......... 1659
  N. REASONS NO RULE WAS AGREED UPON .......... 1661
  O. FEDERAL ADVISORY COMMITTEE ACT PROBLEMS .......... 1664
  P. UNILATERAL OSHA-PROPOSED RULE .......... 1666

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IV. THE FAA FLIGHT AND DUTY TIME NEGOTIATIONS ........... 1667
  A. INTRODUCTION ........................................ 1667
  B. HISTORY OF FLIGHT AND DUTY TIME REGULATIONS ....... 1667
  C. PRENEGOTIATION ACTIVITIES ........................... 1668
  D. ESTABLISHMENT OF NEGOTIATING COMMITTEE ........... 1669
  E. SUITABILITY OF SUBJECT MATTER ...................... 1669
  F. INCENTIVES TO PARTICIPATE .......................... 1669
  G. INTRACONSTITUENCY DIFFERENCES ...................... 1670
  H. THE NEGOTIATIONS .................................... 1670
  I. FINAL RULE ............................................ 1671
  J. DYNAMICS OF NEGOTIATION AND REASONS FOR SUCCESS .. 1673
  K. THE FACA ISSUES ..................................... 1673
  L. THE APA ISSUES ...................................... 1674
V. ENVIRONMENTAL PROTECTION AGENCY NEGOTIATIONS ....... 1674
  A. INTRODUCTION ........................................ 1674
  B. THE NEGOTIATION PROJECT ............................ 1674
  C. NONCONFORMANCE PENALTIES ........................... 1675
    1. Background of Nonconformance Penalties ............ 1675
    2. Prenegotiation Activities ........................ 1676
    3. Establishment of the Negotiating Committee ........ 1677
    4. Incentives to Participate ......................... 1677
    5. Intraconstituency Problems ........................ 1678
    6. The Negotiations .................................. 1678
    7. Postconsensus Process ............................. 1679
    8. Final Rule ........................................ 1679
  D. PESTICIDE EXEMPTIONS ............................... 1679
    1. Background ........................................ 1679
    2. Formation of the Negotiating Committee ............ 1680
    3. Prenegotiation Preparations ....................... 1680
    4. Incentives to Participate ......................... 1681
    5. The Negotiation ................................... 1681
    6. Postconsensus Process ............................. 1681
    7. Final Rule ........................................ 1682
VI. OTHER NEGOTIATIONS—PAST AND PRESENT ................ 1682
  A. INTRODUCTION ........................................ 1682
  B. COKE OVEN NEGOTIATIONS ............................. 1682
  C. THE COTTON DUST EXPERIENCE ......................... 1682
  D. MDA NEGOTIATIONS .................................... 1683
    1. Suitability of MDA for Negotiated Rulemaking ........ 1684
    2. Negotiating Process ............................... 1684
  E. ADDITIONAL EPA RULE NEGOTIATIONS .................. 1686
  F. FEDERAL TRADE COMMISSION NEGOTIATION INITIATIVE ... 1687
  G. NEGOTIATED RULEMAKING BY STATE AND FEDERAL AGENCIES ............................................ 1688
VII. COMPARATIVE ANALYSIS ................................ 1689
VIII. ANALYSIS OF SPECIFIC LEGAL ISSUES ................... 1692
  A. INTRODUCTION ........................................ 1692

OMITTED

B. DELEGATION DOCTRINE .................................... 1693
C. CONFLICT BETWEEN GOALS OF INFORMALITY AND JUDICIAL REVIEWABILITY .................................... 1695
D. HYBRID RULEMAKING .................................... 1696
E. *EX PARTE* COMMUNICATIONS .................................... 1697
F. JUDICIAL REVIEW UNDER ARBITRARY AND CAPRICIOUS STANDARD .................................... 1701
G. FEDERAL ADVISORY COMMITTEE ACT PROBLEM .................................... 1703
H. REPRESENTATION ISSUES .................................... 1707
IX. CONCLUSIONS AND RECOMMENDATIONS .................................... 1708
A. SUMMARY .................................... 1708
B. RECOMMENDATION 85-5 .................................... 1711
C. FUTURE ACUS ACTIVITIES .................................... 1716
D. CONCLUSION .................................... 1717

OMITTED

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### B. THEORETICAL FOUNDATION

Implementation of the negotiated rulemaking concept in practice requires consideration of the characteristics of the negotiation process, interest groups, and regulatory programs.

#### 1. Dynamics of Regulatory Negotiation

Notwithstanding efforts to impose adjudicatory procedures on the formulation of regulatory policy, regulatory program decisions are made in a political environment.[52] The statutory framework of any program is as much a function of the political process that shaped it as it is a function of objective economic or scientific processes. In developing and pursuing a regulatory strategy within this statutory framework, an administrator is unlikely to pursue a strategy that he knows will enrage those groups most influential in the Congress, with the press, or with his superiors in the executive branch, regardless of what "rational" analysis says about the merits of various options.

Regulatory negotiation is but one mechanism to accomplish political accommodation. Negotiation will succeed only when persons able to use other processes have an incentive to participate in negotiations and to reach negotiated agreement. Incentives operate at several different levels: at the level of the negotiation itself, and at lower levels, where negotiations within constituencies are necessary to produce party positions. The best way to understand incentives to negotiate is first to consider the viewpoint of a hypothetical, monolithic party. Having described the incentives for this hypothetical party, one then can overlay complications that influence real world regulatory negotiations, especially complications inherent in intragroup interest aggregation.

A useful conceptual structure for understanding incentives to negotiate is the one offered by Professors Fisher and Ury in their book on the negotiation process.[53] They explain that the participation of any party to a negotiation will be guided by that party's "Best Alternative to Negotiated Agreement" (BATNA). If a party's BATNA is superior to what can be obtained in negotiation, the party will not participate.[54]

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[52] *See generally* Jaffe, *supra* note 17, at 1183 (describing pervasiveness of political compromise in context of administrative regulation).

For potential participants in a regulatory negotiation, BATNAs are determined by perceptions of what the agency will do in the absence of a negotiation.[55] A rational, monolithic party will participate in regulatory negotiation only if it perceives the probable negotiation outcome to be superior to its BATNA, determined by the party's estimate of probable unilateral agency action. Different parties are likely to have different BATNAs because they predict the unilateral agency outcome differently, or because they have different predictions of the cost impact and benefit of agency action.

The BATNA determined participation incentive is not invariant; it likely will change over time for each party, as the party gets additional information about the agency's intentions. Even more important, other negotiators, neutral mediators or convenors, and the agency itself can influence party BATNAs, and hence party incentives to negotiate and to agree.

The most appropriate analogy to a regulatory negotiation is not a traditional labor-management negotiation, where BATNAs are determined by each party's assessment of the opponent's ability to inflict injury or to offer rewards. Instead, the appropriate analogy is to civil litigation settlement negotiation in which party predictions of what a nonparty, the judge or jury, will do determine BATNAs. In regulatory negotiations, as in settlement negotiations, the third party decisionmaker can influence party perception of likely outcome in the absence of a negotiated settlement. In other words, the agency or judge changes BATNAs by what she says about her intentions.

This model suggests that regulatory negotiations are most likely to be successful when the agency (or some other credible source) persuades each potential participant that unilateral agency action has undesirable consequences for that participant. Lower BATNAs mean greater incentives to negotiate a solution.

This analysis yields the first hypothesis for effective regulatory negotiation: parties will negotiate only if they perceive the outcome of unilateral agency action to be worse for them than what is attainable in the negotiation. The hypothesis has three corollaries. Regulatory negotiations are more likely to be successful if: (1) the parties agree on what the outcome will be in the absence of negotiations;[56] (2) the parties disagree on what the outcome will be in the absence of negotiations and are all pessimistic rather than optimistic; and (3) the agency actively influences party perceptions of BATNAs, emphasizing to each party the undesirable consequences of unilateral agency action in terms relevant to each party.[57]

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[53] R. FISHER & W. URY, GETTING TO YES (1981).

[54] Some simple examples are useful. If I am considering buying a car from you and you know I can get the identical car from your competitor across the street for $10,000, I will negotiate with you only if I think our negotiations may produce agreement on a price less than $10,000. The $10,000 is my "Best Alternative to Negotiated Settlement" (BATNA). Alternatively, if I am a plaintiff in a personal injury lawsuit and the expected net value of a jury verdict to me is $25,000, I will negotiate a settlement with you, the defendant, only if the settlement is worth more to me than $25,000. My BATNA in these negotiations is $25,000.

[55] What the agency will do will be affected by what courts, the President, and Congress will do. Consequently, perceptions of these influences are also important.

[56] *See* Perritt, *supra* note 24, at 1256 (settlement via dispute resolution more likely when parties agree on probable trial result).

The preceding analysis of BATNA driven choices about participation has assumed that parties are monolithic: that parties affected by regulatory decisionmaking behave like rational individuals dealing with a single estimate of risk. Real parties do not behave this way. Real parties are represented by individuals, expressing the views of a group of constituents who usually have divergent views. The relations within constituency groups and between constituency groups and individual negotiators complicate the regulatory negotiation dynamics.

Experienced mediators know that three agreements are necessary to any successful two-party negotiation: (1) an agreement between negotiator *A* and his constituents; (2) an agreement between negotiator *B* and her constituents; and (3) an agreement between negotiators *A* and *B*.[58] Agreements (1) and (2) can be called intraparty agreements. Frequently the most difficult mediation job involves achieving the intraparty agreements rather than achieving the negotiator-negotiator agreement.

The intraparty problem is more difficult in regulatory negotiations than in labor negotiations, because the parties to regulatory negotiation are likely to be ad hoc groups or coalitions without formal processes worked out for internal decisionmaking. Ordinarily in regulatory negotiation, there is no equivalent of the "exclusive representation" principle from the law of collective bargaining[59] available to bind constituents to the position taken by a group representative. At any point a constituency may disavow its putative representative in the negotiations, take its own position on matters under negotiation, present formal positions to the agency inconsistent with positions taken by its representative, or sue to have the negotiated rule set aside by the courts. Some risk of this occurring probably is inevitable, but regulatory negotiation cannot be successful unless a way can be found to resolve as many of these potential intraparty disagreements through a representation process in the negotiations instead of outside the negotiations. When representatives must make compromises at the bargaining table, the intraparty problem becomes worse.

It is important for someone involved in the negotiation process, either the representatives themselves, the mediator or convenors, or the agency personnel, to be adroit at diagnosing intraparty problems and working creatively to facilitate intraparty agreement. Someone familiar with the internal structure and decision processes of institutions such as labor unions, corporations, and public interest groups involved in a particular negotiation can be invaluable. Even more valuable would be a mediator who already knows the key decisionmakers within a particular constituency, and thus is trusted to some degree by them.

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[57] Agency persuasion of the type suggested in the text tends to promote similar party perceptions of unilateral agency decision, or to make parties more pessimistic. Both similar perceptions and pessimistic perceptions make BATNAs less attractive and negotiation relatively more attractive.

[58] Dunlop, *supra* note 17, at 1433 (referring to the need for three agreements to conclude a negotiation).

[59] *See* National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (1982) (exclusive representative); Railway Labor Act § 2, Ninth, 45 U.S.C. § 152, Ninth (1982) (same). *See generally* T. SULLIVAN, RESOLVING DEVELOPMENT DISPUTES THROUGH NEGOTIATIONS 39-62 (1984) (contrasting structure for labor representation with lack of structure in public dispute negotiation).

Individual group representatives in regulatory negotiations incur personal risk by participating and greater personal risk by reaching agreement. Any party representative who sits down with an adversary and agrees on a regulation is responsible in some measure for the regulation. If, on the other hand, the same party representative presents positions in the traditional administrative and judicial processes, the representative is not responsible for the outcome to the same degree; the decisionmaker, agency, or judge can be blamed, and the representative can point to the purity of his or her advocacy as proof of aggressive pursuit of constituency objectives.

Personal risk is a difficult problem to deal with, and it always will remain in the background as a continuing bias against meaningful regulatory negotiation. Optimally, other participants, mediators or convenors, and the agency will recognize the source of the risk of and be alert to opportunities to reduce the risk of participation—compared with the risk of nonparticipation—on an ad hoc basis for each individual representative. As the undesirable consequences of unilateral agency action are communicated to constituents of representatives, the relative risk of participation is reduced. Periodic constituency meetings may be desirable,[60] and full reporting to constituents as negotiations proceed is essential. In addition, selecting negotiators with strong power bases can serve to permit freer exploration of compromises.

Moreover, it is important to shield the give and take among negotiation participants from publicity. Fragmentary or inaccurate reports of positions taken or compromises considered by their representatives may alarm constituents, endangering the minimum level of constituent support necessary to make the participation of any representative meaningful.

The choice between open and closed meetings among negotiators, however, also bears on the relative power of different kinds of interest representatives. Public interest groups frequently compensate for small financial and staff resources by mobilizing the press to influence public and congressional opinion. It is easier to accomplish this mobilization when the deliberations of the negotiating group are visible to the press. It is harder to do when the meetings not only are closed to the public, but also when the negotiators pledge nondisclosure. Thus the legal requirement of open meetings may result in a subtle enhancement of public interest group power, even when no outsider comes to the meetings or tries to publicize committee activities. More generally, open meetings benefit groups possessing less influence with agency decisionmakers. The decision whether to open negotiation to public scrutiny bears on the question of who gets to be included in formulating agency policy.

### 2. Characteristics of Interest Groups

Political decisions in a complex society are made primarily through the interaction of interest groups.[61] Legislative action occurs when the balance of political power favors change.[62] The balance of political power generally is determined by the strength and intensity of feeling of groups within society perceiving that they have similar interests on a particular subject.[63]

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[60] This occurred with the American Petroleum Institute and the Air Transport Association in the benzene and flight and duty time negotiations, respectively.

[61] V.O. KEY, *supra* note 17, at 7 (politics is struggle among groups or interests). *See generally* Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985); Cass, *Models of Administrative Action*, 72 VA. L. REV. 363 (1985).

Interest groups arise to provide economies of scale in the exercise of power, and to permit individual concerns about particular issues to be focused within representative institutions.[64] The proposition that policy decisions are made by group interaction raises both macro and micro issues. The macro issues relate to the interaction among groups. The micro issues relate to interaction within groups.

The macro issues raise questions of group power, issue maturity, and intensity of feeling. One commentator has drawn the following general conclusion about issue maturity: "The objective must have been the subject of sufficient political debate so that the groups interested in it and opposed to it can be identified, their positions and relative strengths evaluated, and potential sources of support have time to develop."[65]

Issue maturity plays an important role in the development of how intensely different groups feel about a particular issue and how strongly they prefer different alternatives. Issue maturity also ensures that a range of alternatives has been formulated for consideration.

Intensity of feeling is an important variable in the calculus of public opinion.[66] The influence of a particular group or faction, which combined with the influence of other groups or factions determines popular will, is a function of numerosity and intensity of feeling.[67] Transaction costs reduce the desire of interest groups to have intense involvement in the full range of political decisions.[68] In other words, the cost-benefit ratio for participation in policy formulation is unfavorable when a potential participant is indifferent among outcomes.[69]

Microanalysis of interest groups focuses on the representation, or interest aggregating function, that interest groups perform.[70] It also permits consideration of the ways in which interest groups function to intensify member interest in particular issues, to formulate concrete alternatives, and to articulate member positions.[71]

Interest groups have overcome the fragmentation, transaction-cost, and free-rider difficulties impeding group action through "organizational entrepreneurship."[72] Especially when the issues involved are complicated, group members may defer almost entirely to the decisions of group representatives. This deference can make negotiations involving such representatives more fruitful. Trade unions or trade union federations dealing with complex technical regulatory disputes present an example of this phenomenon. Rank and file members have a low level of awareness of technical issues, and they tend to defer to a handful of staff experts.

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[62] V.O. KEY, *supra* note 17, at 7-8.

[63] *See generally* J. HURST, *supra* note 17, at 1-29. Prof. Hurst discusses the limitations that resources, diffusion of interest, and other factors may present in obtaining legislative response. He suggests that legislatures are fundamentally institutions that provide broad arenas for bargaining among diverse interests. *Id.* at 19. Most people interest themselves in the legislative process, however, only when a matter under consideration has material importance for them. *Id.* at 23.

[64] V.O. KEY, *supra* note 17, at 203 (referring to representation function performed by interest groups).

[65] J. LOGSDON, THE DECISION TO GO TO THE MOON: PROJECT APOLLO AND THE NATIONAL INTEREST 181 (1970).

[66] R. DAHL, A PREFACE TO DEMOCRATIC THEORY 48-50 (1956).

[67] *Id.* at 38.

[68] *Id.* at 44.

[69] *Id.* at 42-43.

[70] V.O. KEY, *supra* note 17, at 203.

[71] *Id.* at 203-04.

On the other hand, some public interest groups may prefer short term litigation victories to negotiation. Greater publicity associated with a dramatic victory and extreme statements made in litigation tend to facilitate fund raising and other facets of membership support. These groups tend to be less risk averse than business groups, and they therefore may prefer the all-or-nothing characteristic of litigation rather than accommodation.[73] In addition to lower risk aversion, public interest groups and trade unions may perceive that adversarial procedures better compensate for scarce technical resources than negotiation.[74] Careful selection of test cases in court permits targeting of scarce resources on key legal issues rather than dissipating them on complex factual disputes.[75]

These are only tendencies of public interest groups. Obviously the most effective consumer groups do more than litigate; many participate regularly in the legislative process, which always involves negotiation and accommodation. For example, the consumer groups involved in the negotiated rulemaking efforts addressed in this article participated actively and in good faith.[76]

Because large firms are more risk averse than small firms or organizational entrepreneurs, a negotiated resolution of a regulatory dispute is likely to be more attractive to interest groups dominated by a few large firms than to public interest groups or other groups with more fragmented membership.[77] Negotiation, however, while attractive, may be more difficult because the large constituents have the resources to develop idiosyncratic positions and priorities, making intragroup compromise more difficult than it is in groups in which constituents defer to their representatives.

### 3. Characteristics of Regulatory Programs

Interest groups interact with regulatory programs. Indeed, interest groups arose in part because of increased government regulation.[78] The nature of the interaction is determined in part by the nature of the regulatory program, because the nature of the program affects the intensity of interest group feeling on regulatory issues.[79]

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[72] Stewart, *The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, 1985 WIS. L. REV. 655, 674.

[73] *Id.* at 674. Organizational entrepreneurship refers to the tendency of organizers of public groups to seek publicity and political support necessary to build and maintain their organizations. *Id.*

[74] This perception existed in the benzene negotiations. Part III.N of the article discusses how this perception contributed to lack of agreement on a rule.

[75] The costs of trying a complex factual issue on remand to the agency may be high after a victory in the appellate courts.

[76] For example, in the case of the FAA negotiations, the Aviation Consumer Action Project (ACAP) dismissed a lawsuit against the FAA once it appeared to the ACAP that the FAA was serious about negotiating and that negotiating would lead to a rule faster than litigation, which would have resulted at most in an order to the agency to promulgate a rule by a certain date.

[77] Stewart, *supra* note 72, at 671-72.

[78] V.O. KEY, *supra* note 17, at 201-02.

Professor James Q. Wilson offers a classification of regulatory programs based on the incidence of costs and benefits likely to influence intensity of group feeling.[80] He suggests that programs fall into three categories. Programs in Wilson's first category concentrate their benefits on a small group and distribute their costs over wide sectors of the population. Economic regulation of railroads and airlines, milk prices and taxicabs fall into this category. Programs in Wilson's second category concentrate both benefits and costs on a small group. Regulatory programs relating to labor-management relations fall into this category; labor or management benefits at the expense of the other. Wilson's third category encompasses most recent consumer and environmental protection and health and safety regulation. Here, benefits are diffused over large parts of the population and costs are concentrated on relatively narrow sectors. As Wilson points out, the development of policy is particularly difficult with respect to the third category of regulation, because the number of transactions subject to the regulation is likely to be far greater than in the first or second categories: a few hundred license applications before the Federal Communications Commission (FCC) compared with safety and health practices in nine million workplaces. One can add to Wilson's list a fourth category. This category includes programs whose costs and benefits both are diffused. An example would be automobile emissions device inspection programs.

Programs in Wilson's second category are better candidates for negotiation than programs in the fourth category, because it is easier to mobilize interest representatives for the bargaining process when the interest groups are few in number and narrow in scope. Moreover, programs with narrow impact are less likely to attract intervention by Congress, the press, the White House, and the public.[81] Between the extremes represented by the second and fourth categories, Wilson's first and third categories present intermediate levels of difficulty in organizing interest representatives for regulatory negotiation.

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[79] The role of intensity in political interaction is summarized in the text accompanying notes 66-69.

[80] *See* Wilson, *The Politics of Regulation*, in THE POLITICS OF REGULATION 357, 366-67 (J. Wilson ed. 1980) (classifications based on group perception of costs and benefits).

[81] *See* Stewart, *supra* note 72, at 670.

## III. THE BENZENE NEGOTIATIONS

### A. INTRODUCTION

In the summer of 1983, the Occupational Safety and Health Administration (OSHA) began to develop a revised standard for workplace exposure to benzene through negotiated rulemaking. An earlier benzene standard had been invalidated in litigation that ultimately reached the Supreme Court.[129] Negotiations proceeded for more than a year, producing agreement in principle. The parties did not report to the OSHA, however, because no agreement could be reached on some details and because the political climate had changed, and there was dissension among the various interests (and others similarly situated). Philip J. Harter and Gerald Cormick facilitated the negotiations.

Although one reason the negotiations adjourned without agreement was that the negotiators expected the OSHA to issue a standard unilaterally, more than a year elapsed before the OSHA published a proposed rule.[130]

### B. HISTORY OF THE REGULATION OF BENZENE BY THE OSHA

Benzene is a clear, colorless, highly flammable liquid with a strong odor. It evaporates rapidly under ordinary atmospheric conditions, giving off vapors nearly three times heavier than air. The petrochemical and petroleum refining industries produce nearly all the benzene used in the United States. Benzene is used as a solvent or a reactant alone or with another liquid. Some 274,000 workers are exposed to benzene in seven major industries: petrochemicals, petroleum refining, coke and coal manufacturing, rubber tire manufacturing, bulk storage terminals, bulk plants, and transportation.[131]

The OSHA adopted the original standard for benzene exposure in 1971. This was a "national consensus standard,"[132] setting a time-weighted-average exposure level (TWA)[133] of 10 parts per million (ppm); ceiling concentrations of 25 ppm; and permitted excursions above the ceiling not to exceed 50 ppm for more than ten minutes in any eight hour work period.[134]

Revision of this standard was triggered by a 1974 report prepared by the National Institute of Occupational Safety and Health (NIOSH),[135] acknowledging that benzene might cause leukemia but recommending retention of the national consensus standard for the time being. In 1976, the United Rubber Workers (URW) petitioned unsuccessfully to lower the standard on an emergency basis. Later that same year, NIOSH submitted a revised report concluding that benzene could cause leukemia and that no safe level for benzene exposure could be established.[136] It recommended that the OSHA establish a new standard prohibiting exposure in excess of 1 ppm.[137]

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[129] American Petroleum Inst. v. OSHA, 581 F.2d 493 (5th Cir. 1978), *aff'd sub nom.* Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607 (1980).

[130] 50 Fed. Reg. 50,512 (1985).

[131] Brief for the Secretary of Labor at 7, *In Re* United Steelworkers of Am., 783 F.2d 1117 (D.C. Cir. 1986).

[132] This standard was established under § 6(a) of the Occupational Safety and Health Act (the Act), 29 U.S.C. § 655(a) (1982).

[133] A time weighted average is an average calculated by multiplying values of a variable by the length of time a particular value existed, and then dividing by the total time period. For example, if the atmospheric concentration of a substance was 5 parts per million for 10 minutes and 2 parts per million for 20 minutes, the time weighted average would be $[(5 \times 10) + (2 \times 20)]/30$, or 3 parts per million.

[134] 43 Fed. Reg. 5,919 (1978).

In response, the OSHA issued voluntary guidelines in January, 1977, recommending that worker exposure to benzene not exceed an eight hour TWA of 1 ppm in any eight hour shift of a forty hour week. Four months later the OSHA promulgated an emergency temporary standard for occupational exposure to benzene[138] setting an eight hour TWA limit of 1 ppm with a ceiling level of 5 ppm for any fifteen minute period during an eight hour work period.[139] Challenges to the standard were filed in Courts of Appeals for both the District of Columbia Circuit and the Fifth Circuit.[140] The Fifth Circuit issued a temporary restraining order against the OSHA,[141] and the emergency standard never went into effect.[142]

One week later, the OSHA published notice of a proposed final benzene standard.[143] Hearings on the proposed standard were held from July 19 through August 10, 1977. Ninety-five persons testified.[144]

The final standard of the OSHA, issued in February, 1978, was identical to the emergency standard, limiting exposure to an eight hour TWA of 1 ppm, with a ceiling of 5 ppm for any fifteen minute period in an eight hour work period. It also prohibited eye and skin contact and required measurement of employee exposure, engineering controls, work practices, personal protective clothing and equipment, signs and labels, employee training, medical surveillance, and record keeping.

Producers and users appealed to the Fifth Circuit seeking preenforcement review of the final standard.[145] The Fifth Circuit invalidated the standard because it was based on findings that were unsupported by the administrative record.[146]

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[135] The report was prepared under § 22(d) of the Act, 29 U.S.C. § 669(d) (1982).

[136] *Id.*

[137] Emergency Temporary Standard for Occupational Exposure to Benzene; Notice of Hearing, 42 Fed. Reg. 22,516 (1977).

[138] *Id.*

[139] Emergency Temporary Standard, 42 Fed. Reg. at 27,465.

[140] Industrial Union Dep't v. Bingham, 570 F.2d 965, 966 (D.C. Cir. 1977); American Petroleum Inst. v. OSHA, 581 F.2d 493 (5th Cir. 1978), *aff'd sub nom.* Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607 (1980).

[141] American Petroleum Inst. v. OSHA, 581 F.2d at 500.

[142] *Id.* at 510.

[143] 42 Fed. Reg. 27,452 (1977).

[144] Occupational Exposure to Benzene, 42 Fed. Reg. 32,263 (1977).

[145] There were two groups of petitioners: a "producers group" led by the American Petroleum Institute and a "users group" led by the Rubber Manufacturers Association (RMA). Some member companies of the RMA filed in the Sixth Circuit, while others filed in the Second Circuit. These cases were transferred to the Fifth Circuit in March, 1978. American Petroleum Inst. v. OSHA, 581 F.2d 493, 499 (5th Cir. 1978), *aff'd sub nom.* Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607 (1980). Some of the positions taken in the multidistrict litigation were reflected subsequently in negotiating positions.

[146] American Petroleum Inst. v. OSHA, 581 F.2d at 504-05.

The court concluded that the OSHA had exceeded its authority because it had not been shown that the eight hour TWA exposure limit was "reasonably necessary or appropriate to provide safe and healthful employment" as required by section 3(8) of the Act.[147] The court further concluded that section 6(b)(5)[148] did not give the OSHA the unbridled discretion to set standards designed to create absolutely risk free workplaces without regard for cost.[149]

The Supreme Court affirmed,[150] with a plurality concluding that the OSHA's rationale for lowering the permissible exposure limit from 10 ppm of benzene to 1 ppm was based on a series of unsupported assumptions indicating that leukemia might result from exposure to 10 ppm of benzene.[151] There had been no showing that leukemia was caused by exposure to 10 ppm of benzene and that it would not be caused by exposure to 1 ppm.[152] The plurality reasoned that section 3(8) of the Act implies that before the Secretary of Labor can set a permanent health or safety standard, he must first find that the workplace is unsafe in the sense that significant risks are present and can be eliminated or lessened by a change in practices.[153] Therefore, the Secretary exceeded his power by avoiding this threshold responsibility when he relied on a special policy for carcinogens that placed the burden of proving the existence of a safe level of exposure to benzene on the industry.[154] The plurality also noted that the Act's legislative history supports the conclusion that Congress was concerned not with absolute safety but with the elimination of significant risk of harm.[155]

Justice Stevens, joined by Chief Justice Burger and Justice Stewart, also concluded that the burden was on the OSHA to show, on the basis of substantial evidence, that it is at least more likely than not that long-term exposure to 10 ppm of benzene presents a significant risk of material health impairment.[156] The OSHA, they concluded, did not satisfy this burden.[157]

Chief Justice Burger, concurring, emphasized that the requirement for the OSHA to "retrace its steps" with greater care does not displace its ability to make policy judgments and noted that the Act also required the Secretary to determine that the economic effects of the new standard bore a reasonable relationship to the expected benefits and that the OSHA had not done this.[158] Justice Rehnquist, concurring in the judgment, expressed the view that section 6(b)(5) of the Act, relied on by the Secretary in promulgating the benzene standard, was an unconstitutional delegation of legislative power to the executive branch.[159]

Justices Marshall, Brennan, White, and Blackmun dissented. They stressed that the Act required a reviewing court to uphold the Secretary's determination if supported by "substantial evidence in the record considered as a whole."[160] Therefore, the Secretary's standard was fully in accord with the statutory mandate of section 6(b)(5) of the Act that standards for toxic materials or harmful physical agents most adequately assure that no employee will suffer material impairment of health or functional capacity.[161]

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[147] *Id.* at 502.

[148] *Id.*

[149] *Id.*

[150] Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 662 (1980).

[151] *Id.* at 630-38.

[152] *Id.*

[153] *Id.* at 639-46.

[154] *Id.* at 658-59.

[155] *Id.* at 646-52.

[156] *Id.* at 653.

[157] *Id.*

[158] *Id.* at 663 (Burger, C.J., concurring).

[159] *Id.* at 672-88 (Rehnquist, J., concurring).

Following the Supreme Court's decision, the OSHA considered various quantitative risk assessments to determine whether it should try again to adopt a standard below 10 ppm. Of the 274,000 workers exposed to benzene, the OSHA estimates that some 262,000 are exposed to concentrations at or below 1 ppm as an eight hour TWA, while approximately 10,000 are exposed to levels between 1 and 5 ppm. The OSHA estimates that fewer than 1,500 workers are presently exposed to benzene levels averaging 5 ppm or more.[162]

On April 14, 1983, Dr. Sidney M. Wolfe, Director of the Public Citizen Health Research Group, wrote Thorne G. Auchter, Assistant Secretary of Labor for Occupational Safety and Health, requesting that the OSHA issue an emergency temporary standard under section 6(c)(1) of the OSHA statute. Auchter denied the petition, noting that only eight to nine percent of workers actually are exposed to benzene in excess of 1 ppm on an eight hour TWA basis. He committed the agency, however, to issue a new permanent standard on an expedited basis, not later than June, 1984. Specifically, he committed to a timetable, pursuant to which the OSHA would add a benzene standard to its "regulatory agenda" by June, 1983; submit a proposed standard to the OMB by November, 1983; publish a proposed standard in the *Federal Register* by December, 1983; hold a fact-finding hearing by February, 1984; and publish the final standard by June, 1984.[163]

### C. DECISION TO NEGOTIATE

At about the same time that Auchter and Wolfe were corresponding over the plans of the OSHA for a revised benzene standard, Philip Harter and Gerald Cormick held discussions with the OSHA staff about the potential for regulatory negotiation to facilitate the standard setting activities of the OSHA. As a result of these discussions, Assistant Secretary Auchter decided to explore negotiated rulemaking as a means of resolving the benzene dispute. The OSHA's interest in regulatory negotiation was heightened by a perception that negotiations had been useful in connection with development of the coke oven standard.[164]

Preliminary discussions with the parties and actual negotiations proceeded from July, 1983, until October, 1984. Initially the convenor/facilitators[165] determined that the parties were skeptical that negotiations could produce a consensus on OSHA action, but they thought meetings might be helpful. After the meetings began, the participants decided to attempt to narrow their differences and to reach agreement on a standard under a protocol that required agreement on a "total package" before anything substantive was reported to the OSHA. Representation of the petroleum industry, one of the key industry stakeholders, proved difficult because of dissension among firms within the industry about the wisdom of negotiating. Nonparticipant trade unions were concerned that options being considered in the negotiation might set an adverse precedent for other health standards of the OSHA. Nevertheless, the participants nearly agreed on a standard before finally adjourning in the fall of 1984.

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[160] *Id.* at 695 (Marshall, J., dissenting) (citing 29 U.S.C. § 655(f) (1982)).

[161] *Id.* at 688-94.

[162] Brief for the Secretary of Labor at 7-8, *In Re* United Steelworkers of Am., 783 F.2d 1117 (D.C. Cir. 1985).

[163] *Id.* at 7 (quoting from Thomas G. Auchter letter to Sidney M. Wolfe). A proposed standard was not published until December, 1985. 50 Fed. Reg. 50,512 (1985).

[164] Part VI.B of the article discusses the coke oven negotiations.

[165] Philip Harter and Gerald Cormick served as convenors and facilitators.

### D. ISSUES IN NEGOTIATION

The central issue in the benzene negotiations was the Permissible Exposure Limit (PEL). The existing standard was set at 10 ppm, and the effort of the OSHA to set a standard at 1 ppm had been invalidated in the Supreme Court. The steel industry, facing difficulty in meeting the 10 ppm standard and questioning evidence of health hazards below that level, opposed reducing it. The rubber industry had been meeting a 1 ppm level since the late 1970's.

Between these extremes were the petroleum and chemical industries, which thought they could accept a level of 2 ppm, although they were not persuaded that it was justified on a scientific or medical basis. A 1 ppm standard was a problem for the petroleum and chemical industries because of variability in measurements. Eighty-five to ninety percent of monitoring results would show levels lower than 1 ppm, but measurements above that level also would occur, involving different locations and circumstances hard to predict or evaluate. Thus frequent measurements in a single facility would show noncompliance with a 1 ppm limit at least some of the time.[166]

Labor vigorously opposed anything higher than 1 ppm, and the number "1" became an article of faith within the labor movement. New scientific data that had become available since the promulgation of the 1978 standard reinforced the labor view that a 1 ppm standard was justified based on health risk.

Industry hoped to deal with its own concerns, while satisfying labor's desire for a standard of 1 ppm, primarily through the concept of averaging: requiring an employer to show compliance with a 1 ppm standard by an average of measurements taken over some time period. Many different ideas were explored with respect to averaging: a standard expressed in terms of "ppm-hours," such as a limit of 40 ppm-hours; providing that a single "exceedence" of the eight hour TWA would not result in a violation as long as the average eight hour TWA for the previous five readings was within the standard; providing that a single "exceedence" of the eight hour TWA would not result in a violation as long as the average eight hour TWA for the next five readings was within the standard.

Labor was concerned that a standard that allowed averaging would set a precedent for other health standards. Some labor participants preferred setting a simple PEL of 1 ppm, and dealing with the problems caused by exceeding the standard through enforcement guidelines.

The impact of a new benzene standard on tort liability also was a concern for industry, particularly petroleum refiners. Many of those familiar with the negotiations perceived the tort liability issue as more important to some industry participants than the PEL. Gasoline has benzene in it. Benzene causes leukemia and other blood disorders, and may cause tumors. Everyone who drives a car is exposed to low levels of benzene. Employees exposed to benzene in enterprises outside the petroleum industry may sue manufacturers of benzene instead of, or in addition to, their own employers because of workers' compensation limitations on suit, or for other reasons. Thus the class of potential plaintiffs against petroleum industry defendants is extremely large. Asbestos litigation, and litigation over benzene-caused disease in Gulf Coast shipyard industry made industry executives sensitive to the potential for benzene litigation in which their companies might be defendants.

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[166] This is known as the "exceedence problem."

The relationship between the ability of petroleum companies to defend such lawsuits and a finding by the OSHA of significant health risk at levels of 10 ppm or below is speculative. Section 4(b)(4) of the Occupational Safety and Health Act[167] says that the OSHA standards shall not be outcome determinative in tort litigation. Nevertheless, it was widely perceived that a finding of significant health risk could affect adversely the industry's ability to protect itself against large tort liability. Labor was basically uninterested in tort liability, but it was willing to try to develop language satisfactory to the petroleum refiners as long as the language did not jeopardize the ability of the standard to survive judicial review.

The negotiators were faced with a dilemma, however, in formulating a compromise. Industry wanted to avoid a strong finding of health risk below 10 ppm to mitigate tort liability problems. If the finding was weakened to reduce tort liability problems, however, the chance that a negotiated standard would be invalidated in the courts increased, leaving the parties in the position of having compromised on some issues without the benefits of the total negotiated package.

The rubber industry had been concerned previously only with that part of a standard that might deal with skin contact. The industry hoped for an exemption for uses of liquids with a content of less than 0.3% benzene by volume but labor was opposed to an outright exemption. The negotiators agreed upon an exemption for employers who could show both that liquids contacting employees' skin contained less than 0.3% benzene by volume, *and* absorption rates low enough that a 1 ppm level would not be exceeded.[168]

Labor understood that variability of benzene levels presented legitimate problems for standard definition. Labor participants sought to determine actual industry practice regarding temporary excursions and to write those practices into a standard; for example, requiring action and frequent monitoring after a spill or a ventilation system failure. They perceived, however, that industry participants were never willing to be pinned down about what should be required when the standard was exceeded, that is, what action should be taken when the "action level" was exceeded.

A separate goal for labor was to use the benzene negotiations to induce the OSHA to accept the proposition that medical surveillance was most needed for older workers, some of whom had left active service. Industry participants were reluctant to embrace this idea, apparently out of fear that it would stir up tort claims by the older workers. In addition, industry noted that screening of older workers does not permit prophylactic action to the same degree as screening of younger workers.

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[167] 29 U.S.C. § 653(b)(4) (1982).

[168] The Rubber Manufacturers Association and the United Rubber Workers reported their agreement to the OSHA in a letter on Feb. 16, 1984.

In general, the labor participants were unaccustomed to the idea that different parts of a benzene standard could be traded off against each other, based on economic impact. Labor was accustomed to thinking of each piece of a standard—the PEL, engineering controls, monitoring, medical surveillance, action requirements—as independent components, each with its own rationale. Participation by labor in discussing tradeoffs resulted only from the realization that industry viewed the standard as a total package and was concerned with the overall economic and health impacts.

### E. BENZENE AS A CANDIDATE FOR NEGOTIATED RULEMAKING

In retrospect, benzene was both a good and a bad candidate for negotiated rulemaking. Benzene was a good candidate because formulation of a rule required several different subjects to be addressed, creating the potential for tradeoffs;[169] because party positions had crystallized during seven years of rulemaking proceedings and litigation reaching the Supreme Court of the United States;[170] and because a limited number of parties were involved.[171]

The history of the litigation also made benzene a good candidate for another reason: a standard generally supported by organized labor had been invalidated in the courts because of aggressive opposition by industry, and promulgation of a revised standard had been delayed for seven years. This demonstrated that a measure of acceptability to industry could speed attainment of labor's health and safety objectives.[172]

Benzene was a bad candidate because the years of administrative and court litigation had solidified the positions of the parties and the agency and generated a voluminous record lending support to each of those positions. In addition, benzene was a bad candidate because of the perception that benzene exposure creates significant health risks, including the risk of fatal disease. This increased the likelihood that basic values would be at issue in negotiations.[173] Finally, though benzene is a single substance, the issues confronting the different industries that would be affected by a benzene rule were diverse, resulting in a complex, multipolar negotiation and making it difficult for the participants to assimilate all the data relevant to the issues under discussion.[174]

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[169] This satisfied Harter's seventh criterion (permitting tradeoffs). *See* Harter, *supra* note 7, at 50, and ¶ 4(d) of ACUS Recommendation 82-4. 47 Fed. Reg. at 30,709.

[170] This satisfied Harter's third criterion (issue maturity). *See* Harter, *supra* note 7, at 47, and ¶ 4(a) of ACUS Recommendation 82-4. 47 Fed. Reg. at 30,709.

[171] This satisfied Harter's second criterion (limited number of parties). *See* Harter, *supra* note 7, at 46, and ¶ 4(c) of ACUS Recommendation 82-4. 47 Fed. Reg. at 30,709.

[172] This satisfies Harter's first criterion (countervailing power). *See* Harter, *supra* note 7, at 45, and ¶ 4(e) of ACUS Recommendation 82-4. 47 Fed. Reg. at 30,709.

[173] This violates Harter's sixth criterion (fundamental values). *See* Harter, *supra* note 7, at 49-50, and ¶ 4(b) of ACUS Recommendation 82-4. 47 Fed. Reg. at 30,709.

[174] This made it difficult for Harter's seventh criterion (tradeoff), *see* Harter, *supra* note 7, at 50, and ¶ 4(d) of ACUS Recommendation 82-4, to be realized in fact. 47 Fed. Reg. at 30,709.

Some participants thought benzene was a bad candidate because the issues were essentially technical, reinforcing their view that a "correct" standard could be determined objectively.[175] The technical nature of the issues, in the view of these participants, meant that the most useful process for developing a standard would be probing examination of research data—an activity for which negotiations are less well suited than formal adjudicatory hearings. They thought that labor's disparity of resources and technical expertise would be a more prominent handicap in negotiations than in traditional administrative litigation. They also feared that the negotiations would delay the issuance of a standard, despite the commitment of the OSHA to issue a final standard by June, 1984.[176]

Another reason benzene was a bad candidate was the parties' differing perceptions of the implications of the Supreme Court's decision. Labor believed that a 1 ppm standard could pass court review if the OSHA did a better job of marshaling scientific evidence in support of the standard. Taking this view, there was little to be accomplished in negotiations, since the only remaining problem was a technical data analysis. Industry, on the other hand, viewed the Court's decision as a repudiation of attempts by the OSHA to revise the 10 ppm national consensus standard. This perception suggested that negotiations would be concerned with the full range of issues related to benzene exposure in the workplace.[177]

Benzene also was a bad candidate because the statute authorizing a standard makes a finding of "significant health risk" a prerequisite for agency power to regulate. The importance of this finding to a valid standard had been underscored by the Supreme Court in *Industrial Union Department v. American Petroleum Institute*,[178] and the participants in the benzene negotiation were acutely aware of it. The centrality of the significant health risk finding presented a dilemma that utlimately proved insurmountable. If a negotiated standard was to survive judicial review,[179] the OSHA must find that significant health risks resulted from the existing standard of 10 ppm. A finding of health risks at PELs *lower* than 10 ppm was perceived, however, by the petroleum industry at least, as increasing potential tort liability. Industry thought the OSHA was inclined to read the requirement of the Supreme Court decision as saying, "Quantify the risk, making it seem as high as possible at the lowest possible exposure levels." They hoped to frame a risk finding that would recognize a risk at a PEL of 10 ppm, but would not say that a risk existed at the new PEL. The participants, however, were unable to develop language that satisfied both the tort and statutory criteria.

### F. INCENTIVES TO PARTICIPATE—IN GENERAL

Both labor and industry believed that uncertainty could be reduced by negotiations. The traditional adversary process usually results in opposing parties taking extreme positions, and consequently building a record that supports agency action anywhere in between. One participant described the result as a "crap shoot." In contrast, if the parties negotiated an NPRM, or at least narrowed the issues through negotiations, they could make the ultimate standard more predictable. All of the parties perceived themselves as risk averse—industry more than labor. Thus reducing uncertainty was a benefit.

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[175] This violates Harter's eighth criterion (research not determinative of outcome). *See* Harter, *supra* note 7, at 50-51.

[176] No standard was issued until more than a year after the negotiations adjourned. 50 Fed. Reg. 50,512 (1985).

[177] This muddied Harter's fifth criterion (opportunity for gain). *See* Harter, *supra* note 7, at 48-49.

[178] 448 U.S. 607 (1980).

[179] This implicates Harter's ninth criterion (implementation). *See* Harter, *supra* note 7, at 51.

Virtually all participants lacked confidence in the OSHA; there was considerable concern that the OSHA would "screw up" a new standard through the regular process, either by promulgating a standard that could not be defended in the courts or by imposing collateral requirements with high costs for relatively little health benefit.

The participants recognized that an individual employer, even a member of one of the participating trade associations, or a union entity or public interest group, could challenge a negotiated standard. Most of the participants were nevertheless reasonably confident that any such challenger would be hard pressed to convince a court to invalidate a standard that unions and trade associations most directly affected had not only agreed upon but also actively defended. Others, however, thought that a challenge to a negotiated standard might be strengthened by the negotiation process, because of their belief that a court would find patent violations of the FACA, or a violation of the APA prohibitions on *ex parte* contact, or prohibitions on delegation of governmental authority to private citizens.

### G. INCENTIVES FOR THE OSHA TO PARTICIPATE

The OSHA did not particpate in the benzene negotiations directly. It did not take part in the discussions among industry, labor, and public interest representatives. It did, however, pay the convenor/mediators[180] and indicated its willingness to use a negotiated standard as the basis for its rulemaking.

Enthusiasm for the process was higher at policy levels within the agency than at "working levels." Many health standards personnel of the OSHA and their legal staffs had major doubts whether benzene was a good candidate for negotiated rulemaking, and further doubts about the way the negotiations were handled, believing that the convenor/mediators consistently were too optimistic about the prospects for agreement. The commitment of the OSHA to the process, low from the beginning, was retarded further by its lack of participation in the negotiations themselves.

Nevertheless, sharp adversarial conflict during rulemaking and in court challenges make the agency's job more difficult, and in the words of one official of the OSHA, negotiated rulemaking was "worth a try."

### H. INCENTIVES FOR LABOR TO PARTICIPATE

Organized labor had two reasons to believe that negotiations would be preferable to the traditional rulemaking process. First, a negotiated standard accompanied by an agreement not to litigate the legality of the standard could save organized labor significant litigation expenses. Second, the perception that the

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[180] Actually the OSHA covered less than 50% of the mediators' costs. The remainder was covered by neutral nongovernment sources and by the mediators themselves.

OSHA was in unfriendly hands increased labor's fear that an agency promulgated standard would be delayed and might not satisfy labor's desires as well as a negotiated standard.

Labor's incentive to negotiate was reinforced by industry's power to delay. Labor did not believe a 1 ppm standard was vulnerable to judicial attack. It thought a court would likely find the OSHA entitled to opt for greater health protection, working from uncertain scientific evidence, as long as it supported a lower standard with a finding of significant health risks at benzene levels higher than the standard. On the other hand, industry had already delayed promulgation of a lower standard for eight years, and could delay it further by arguments presented to the OMB[181] and by litigating aggressively.

Some labor participants perceived the OMB as a bigger threat than the courts to a standard from the OSHA. To them, industry support for a standard before the OMB was more important than an agreement not to challenge the standard in court. Labor's motivation to negotiate was strengthened by an informal assurance by the OMB that any proposal by the OSHA based on negotiated agreement would be cleared by the OMB within twenty-four hours.

Labor's incentives to participate were mitigated by a perception that the OSHA had committed itself to issuing a standard within a short time and a belief that this standard would adopt a PEL of 1 ppm. In addition, some labor participants were more comfortable with the traditional hybrid rulemaking process than with negotiation, believing that adversary administrative litigation, especially cross-examination of industry witnesses, is the best way to develop scientific data and a factual record to support an adequately protective standard. They were pessimistic, however, that a standard acceptable to them could be promulgated within the eight months promised by the OSHA, given what labor perceived as the unsympathetic attitude of the OSHA and the OMB.

Other labor participants, and some nonparticipants allied in interest with the labor participants, were suspicious of the negotiation process. As noted above in the discussion of benzene as a candidate for negotiated rulemaking, some participants feared that labor's resource limitations would be magnified in negotiations, and that negotiations might delay issuance of a standard. Nevertheless, because they thought the OSHA wanted negotiations to occur, they reluctantly agreed to participate.

### I. INCENTIVES FOR INDUSTRY TO PARTICIPATE

Before identifying positive incentives for industry to participate, it is useful to note a change in industry position since the 1977 standard was issued. During the three years between adoption of the emergency standard and invalidation of the final 1 ppm standard by the Supreme Court, a number of firms had reduced benzene levels in their workplaces. Thus the marginal cost for the industry to reach the 1 ppm standard in 1983-1984 was less, in real dollars, that it would have been in 1977-1978.

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[181] Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981), *reprinted as* note to 5 U.S.C.A. § 601 (West 1985 Supp.), requires that agencies submit "major rules" to the Office of Management and Budget (OMB) and withhold final action until they have received and responded to the views of the OMB on the rule. The executive order is intended to improve the cost/benefit ratio of agency rules.

Industry's incentives to participate in negotiations depended on its perception of probable action by the OSHA in the absence of a negotiated standard. After the Supreme Court litigation, it appeared virtually certain that the OSHA would find a way to justify a 1 ppm standard, and might accompany this standard with findings, not only that exposures at the 10 ppm level posed health hazards, but also that a 1 ppm standard presented health hazards. In addition, a variety of ancillary issues would be addressed in a standard, such as health monitoring, averaging, and the action level, that might be influenced in a negotiation. There was a perception, at least among some in the industry, that some alternative needed to be found to adversarial rulemaking, and that regulatory negotiation was worth a try. Some other industry participants were pessimistic that anything useful could come from the negotiation project but elected to participate for defensive reasons. They were afraid a process excluding them might produce an undesirable outcome.

### J. DIFFERENCES AMONG THE INDUSTRY PARTICPANTS AND WITHIN INDUSTRY CONSTITUENCIES

The possibility of a 1 ppm PEL presented different concerns to the different industries involved. The petroleum, chemical, and rubber industries were able to tolerate a 1 ppm standard better than was the steel industry. On the other hand, the petroleum and chemical industries were more concerned about tort liability than was the steel industry. This concern with tort liability made petroleum and chemical participants more willing to accept a 1 ppm standard in exchange for the absence of an agency finding that benzene exposure created significant health risks below levels of 10 ppm.

The rubber industry had much narrower concerns than the other industries, limited to that part of the standard than would address dermal contact. The rubber industry expressed little concern about the PEL during the negotiations. Representatives of the different industries did not undercut each other's positions in formal negotiated sessions, but neither did they offer aggressive support for positions other than their own.

The American Petroleum Institute (API) played the leading role on the industry side. API participation was viewed as essential by labor. API also had more internal difficulties than the other industry groups participating. These facts combined to make API difficult in plenary sessions and in industry caucuses. Some of the other industry participants resented what they perceived as API dominance, and occasionally maneuvered to have the chemical industry participants, rather than API, speak for industry in sessions of the full negotiating group.

Most of the industry participants in the benzene negotiations worked in the health and safety functions of regulated enterprises or trade associations. Industrial relations officers in the same organizations were anxious about direct dealings between labor and industry in the benzene negotiations. One concern related to the possible content of a negotiated standard—the possibility that it might prejudice positions in future labor-industry negotiations. Another concern related the possible precedent setting effect of industry-level negotiations; both the petroleum and chemical industries had resisted industrywide bargaining with trade unions, and opposed conduct that might make such industrywide bargaining more likely in the future.

One of the most serious difficulties experienced during the negotiation involved internal dissension within API. Much of the difficulty was structural; hundreds of petroleum companies would be adversely affected by a regulation requiring reduced benzene exposures, many more than in any of the other industries. Moreover, the large size of the industry leaders meant that large numbers of people within each company felt entitled to be included in discussion of negotiating positions taken by industry representations.

The petroleum industry participated through a three-tiered committee system. At the highest level was a committee of thirty to forty company vice presidents with responsibility for environmental and health matters. At least one member of this group was intransigent in opposing industry participation in the benzene negotiations. Chief executive officers of petroleum companies were briefed from time to time on the negotiations and were supportive, but they never effectively restrained their vice presidents who had more direct control. As a result, the petroleum industry representatives were regularly subjected to criticism by others from within their own industry. Fear of adverse public reaction prevented a decision by the petroleum industry to withdraw from the negotiations. Concerns within the industry, however, made meaningful compromises at the bargaining table difficult.

Despite these internal difficulties, however, the petroleum industry finally supported a compromise benzene standard with considerable unity. This compromise was the basis of the near-agreement in the negotiations.

### K. INTRALABOR MOVEMENT DIFFERENCES

Labor participants perceived intraconstituency differences as less of a problem for labor than for industry. Union health and safety representatives regularly worked together on matters involving the OSHA, and thus were accustomed to the process of compromise in formulating strategic administrative and judicial litigation strategies. Moreover, labor participants thought they had greater authority to speak for their constituents than industry representatives.

In part, labor unity was due to general agreement that the 1978 standard was the minimum that would be acceptable. It was further enhanced by respect for the lead role the AFL-CIO traditionally had taken on health and safety issues, and by personal respect for the AFL-CIO spokesperson.

Opposing these unifying forces were some differences among the participating unions and some strong feelings held by unions that did not participate. The United Rubber Workers (URW) had greater trust in its industry counterparts than did the other unions. It was more willing to accept various compromises proposed during the negotiations. The Oil, Chemical & Atomic Workers (OCAW) historically had invested heavily in health and safety issues, although in the opinion of internal union critics had little to show for the investment. Faced with declining membership and failed merger explorations, OCAW was perceived as having an acute need for some tangible evidence of success on the health and safety front. A negotiated benzene rule would be such evidence, on an issue of particular concern to rank-and-file refinery workers. There also were some differences between those accustomed to the give and take of collective bargaining and those more accustomed to the formal adversary process of traditional rulemaking.

Labor's limited resources discouraged additional conferences to iron out differences and arrive at a common position outside the full negotiations with industry representatives. As a result, labor differences tended to surface at the table for everyone to see.

Labor constituency problems arose, not so much within represented unions as within the labor movement as a whole. Most approached the OSHA standard setting from a global perspective rather than an industry-specific perspective. Accordingly, the precedent setting effects of particular elements of a benzene standard were a concern. After agreement on a standard seemed a real possibility, the United Auto Workers (UAW) and Amalgamated Clothing and Textile Workers Union (ACTWU) were quite critical of the process, and this criticism within the labor movement apparently discouraged participating union representatives from taking major risks to reach final agreement.

### L. NEGOTIATION PROTOCOLS

It is important to recall that, when the benzene negotiations began, no one expected an agreement on a total package but, largely due to the enthusiasm of Assistant Secretary Auchter, the effort was transformed into an attempt actually to negotiate a standard. Some resentment that the process had been transformed lingered and was amplified when Auchter resigned while negotiation was under way.

The parties agreed that none would promote, as products of the negotiation process, anything that was not agreed to by all participants. This ground rule did not, however, preclude consideration of an agreement that would leave certain issues to be decided by the OSHA. In this regard early agreement of the URW and the rubber industry trade association[182] was something of an irritant to industry participants.

The parties also agreed, at least tacitly, that none of the participants would challenge any aspects of a standard that had been agreed to in the negotiation. In this way, both labor and industry could buy themselves a measure of certainty. On the other hand, the union participants understood that the trade associations could not guarantee that none of their corporate members would litigate the legality of an ultimate standard, even if the participants reached agreement. Nevertheless, it was perceived that an agreement would be a powerful psychological motivation for a court to sustain a standard from the OSHA, which is entitled to considerable deference under both the APA and the OSHA Act.

### M. THE NEGOTIATION PROCESS

Perhaps the most salient feature of the benzene negotiation process is that the agency with the statutory responsibility for establishing a standard did not actually participate in the negotiations. Instead, the OSHA said that it would use any negotiated standard as a basis for its rule, encouraged the parties to work out their differences in good faith, attempted to increase incentives for affected interests to participate by threatening to proceed with its own standard regardless of the pace of negotiations, and kept itself informed, through the mediators, on negotiating progress.

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[182] The Rubber Manufacturers Association and the URW reported their agreement to the OSHA in a letter on Feb. 16, 1984.

This kind of agency nonparticipation had been recognized as one of the two basic forms of negotiated rulemaking.[183] One advantage when the agency does not participate is that deliberations may be more candid in the absence of the ultimate decisionmaker.

In addition to this theoretical justification for the low profile of the OSHA, however, there is significant evidence that the OSHA limited its participation because it did not want the FACA[184] to apply to the benzene negotiations, and it perceived that if the agency did not participate, the FACA would not apply.[185] The OSHA subsequently was encouraged to limit its participation by the perception that substantial agreement was reached in the cotton dust rulemaking without agency involvement. Indeed the cotton dust agreement[186] was used by some personnel of the OSHA and their lawyers as a post hoc model for the structure of the benzene negotiations.[187]

Many of the private participants did not want the OSHA to take part in the negotiations, fearing that the OSHA would adopt compromises in bits and pieces without understanding the tradeoffs involved.

Among the private participants, there was some initial discomfort with the give and take of negotiations. Industry representatives were more comfortable than labor representatives with the idea that elements of a total package could be traded off against each other based on cost and health benefits. Over the course of discussions, the participants gradually accepted the idea that they should attempt to negotiate a "total package," largely because industry constituents were unwilling to proceed unless they could be assured that certain aspects of a standard undesirable to them could be made up by labor concessions on other issues.

Everyone recognized the political problems within the petroleum industry. At one point, the API participants were forbidden to discuss a standard of 1 ppm, a restriction several participants from both industry and labor characterized as "silly." During the period this restriction was in effect, others continued to negotiate, with the API representatives as observers. One objective of proceeding in this manner was to present the API constituents with the possibility that everyone else would negotiate a standard without their participation unless unrealistic constraints on their representative were relaxed.[188]

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[183] *See* Harter, *supra* note 7, at 57-67 (advantages and disadvantages of agency participation or nonparticipation).

[184] The FACA is addressed more fully in part VIII.G of the article.

[185] The theory is that the FACA applies only to the communication of advice by a group to an agency. If negotiations took place only among private citizens, and a negotiated recommendation was communicated to the agency by a single person—the mediator—the FACA would not be applicable. This theory finds some support in the GSA guidelines for the FACA. 48 Fed. Reg. 19,325 (1983) (preamble) (only groups reporting directly to agency, rather than through intermediary, are advisiory committees under the Act). Substantial disagreement exists concerning the merits of this interpretation of the FACA.

[186] Part VI.C of the article discusses the cotton dust agreement.

[187] Legal advisors of the OSHA developed this interpretation of the FACA only in reaction to a decision at the policy level to proceed with negotiated rulemaking, combined with participants' opposition to negotiating under the strictures of the FACA. The statutory interpretation derived from the observation that purely private negotiation, as occurred with the cotton dust standard, would not be subject to the FACA. Benzene negotiations without participation by the OSHA would be only a small step from the cotton dust procedure.

The problem of finding health risk initially was handled in a discussion of general principles to be included in a preamble to a negotiated standard. The facilitators urged dealing with the preamble only in terms of general principles until the remainder of the standard was resolved. Participant attorneys urged, however, that preamble language be addressed in detail. One industry attorney produced a draft of actual preamble language that, rather than reflecting a compromise position based on the discussion, "tilted" substantially toward industry's position. Labor lawyers who were not participating in the negotiations suggested only modest changes. When the draft preamble was presented to the labor negotiators, however, they took it as an act of bad faith in the negotiations.

Virtually all the participants, however, thought that the quality of most of the discussions in the negotiation was principled rather than being merely power based, and that the interest representatives genuinely sought to understand one another and to narrow their differences as much as possible. Indeed the negotiators came much closer to agreeing than most participants thought was possible when they began discussions.

### N. REASONS NO RULE WAS AGREED UPON

Several conditions contributed to the failure of the benzene negotiations, despite the agreement in principle.

Two aspects of the OSHA's role were harmful: nonparticipation by the OSHA and distribution by the OSHA of a draft standard midway through the negotiations.

Nonparticipation by the OSHA reinforced the consensus ground rule that the contents of the negotiation would not be used as the basis for a rule unless the parties formally could agree on a total package. If the OSHA had been present during the negotiating sessions, it would have gained its own contemporaneous impressions of what the parties could accept in a final standard. If present, even if the parties could not agree formally on a total package, or indeed on anything, the OSHA nevertheless would have the benefit of deliberations in promulgating its own standard.[189]

Nonparticipation by the OSHA forced the parties to communicate the "results" of the negotiations to the OSHA, which in turn made adoption of a rigid consensus definition more likely. To the extent that results were to be communicated in a formal document, the likelihood of failure because of unwillingness or political inability to commit in writing to a compromise position was increased. Communications about the status of negotiations occurred via the mediators, but divergent information also was communicated indirectly by parties to agency personnel. Because the agency could not reach its own conclusions about negotiating progress, mediator credibility with the agency and the parties was reduced. In addition, nonparticipation by the OSHA gave it less of a stake in successful negotiations and therefore less motivation to use its ultimate power to create incentives for parties to negotiate meaningfully.

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[188] The facts asserted in the text were reported to the author, independently, by several participants in the negotiations, who were promised anonymity by the author.

[189] Some of the participants feared OSHA participation because they thought the OSHA would use the deliberations without an understanding of its subtleties.

Even without active participation in the negotiations, the OSHA could have been more supportive of the negotiations. Staff level personnel of the OSHA gave conflicting signals to participants as to how committed the agency was to the negotiation process. As a result, some participants were never sure that the OSHA really wanted the negotiations to succeed.

Distribution by the OSHA of a draft standard midway through the negotiations hardened party positions and reduced the likelihood of reaching agreement. Labor thought the draft of the OSHA standard looked better than what the negotiators were about to agree upon.[190]

The convergence of election campaigns for the presidency of the United States and of the United Steelworkers of America (USW) impeded negotiations. The first made organized labor reluctant to appear to be cooperating with the Reagan Administration; the second diverted the attention of the USW participants and probably made the USW participants more reluctant to be identified with a negotiated standard that might be unpopular within the union or with its new administration.

The departure of Assistant Secretary Auchter from the OSHA before the negotiations were complete also was a problem. Auchter was enthusiastic about the negotiation process, and he also was perceived as having sufficient influence to ensure that a standard would be issued by the OSHA unilaterally if the negotiations did not succeed. After he resigned, the prospect of speedy clearance by the OMB and issuance of a unilateral standard by the OSHA diminished. This changed party BATNAs,[191] lessening the incentive to agree in the negotiations.

Superimposed on these difficulties were others: the controversial nature of the averaging concept for union constituents; and a residual belief among some industry constituents that the negotiation process was a mistake that should be avoided in favor of aggressive litigation—which had, after all, already delayed a tighter standard for seven years.

At least some of the labor participants had a continuing conviction that hybrid rulemaking would have been a superior process to negotiation in developing a standard. This conviction was a reinforced by some difficulty in getting specific data from industry representatives to support the need for averaging or from the OSHA as the negotiations proceeded, though some data was provided by both.

In addition, some participants thought the negotiations dragged on too long and the meetings were too infrequent. This broke momentum and added to constituency pressures as more and more constituents found out about the negotiations or became convinced that negotiations might actually produce a standard.

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[190] At least one participant believes that the release by the OSHA of the draft standard was helpful. The draft standard made no difference in party perceptions by adopting a 1 ppm standard; all participants expected that outcome. Release of the draft may have caused some helpful movement on the industry side, because it made recalcitrant constituents take seriously the threat of independent adoption by the OSHA of a 1 ppm standard. This observation is based on interviews with both industry and labor negotiators.

[191] Part II.B.1 of the article explains the BATNA concept.

Increased constituent awareness put more pressure on participants to stiffen their positions. Infrequent meetings increased the likelihood that memories about positions or concessions would become fuzzy, leading to perceptions that participants were changing their positions between sessions. On the other hand, time was required to work on constituency problems and the negotiations probably could not have moved faster.

Serious intraconstituency problems on both the industry and labor sides—particularly within the petroleum industry—caused participants to seem to embrace a solution to a problem at one session, only to back away at the next session. This presented opposing participants with a moving target.

There was some sentiment that the negotiators moved too abruptly from considerations of general principles in outline form to the drafting of detailed language, particularly preamble language, which dramatized the difficulty of dealing with the issue of finding a health risk. One labor participant characterized the preamble draft as an "affront," revealing for the first time that industry was using the negotiations "to take us for a ride."

Two substantive issues blocked agreement, and might have been fatal to consensus on a standard even in a more favorable political environment. The first was the difficulty in reconciling industry desire for a weaker finding of health risk against the need for an unequivocal finding to sustain a standard of less than 10 ppm in litigation. The most obvious reason for the failure to reach agreement is that the parties simply ran out of ideas for ways to resolve their differences. Labor was wedded to the idea of a 1 ppm standard. The only way industry could accept a 1 ppm standard was to have a rule that allowed some flexibility when the standard was exceeded. The only idea for reconciling these positions that occurred to anyone was some type of averaging, but averaging proved unacceptable in principle to the labor movement as a whole.

Serious consideration by labor participants of solutions to the exceedence problem was retarded to some degree by the precedent set by the coke oven negotiations.[192] The coke oven controversy was addressed by adopting a relatively simple and strict standard and dealing with implementation problems through separate compliance directives. Some labor participants wanted to take the same approach in the benzene negotiations—an idea the industry participants strongly opposed.

The second substantive reason for failure was fear by labor representatives that the averaging concept, if adopted by the benzene negotiators, would become a precedent for averaging in other standards. This concern was made more acute when one industry attorney, who had participated in some of the industry negotiations, made a presentation to the OSHA in the presence of officials from other unions that the averaging concepts discussed in the benzene negotiations should be used in another health standard.

Moreover, labor feared that enforcement of certain averaging concepts would be more difficult. Enforcement of a forty hour TWA standard would require more than one visit by a compliance officer, and labor was concerned that inspections already were difficult to arrange. Some petroleum industry companies were initially opposed to averaging but became convinced that averaging was necessary because of the variability of samples taken at a particular point in time.

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[192] Part VI.B of the article discusses the coke oven negotiations.

In the end, labor, after a period of consultation with nonparticipant unions, took a broad look at what was emerging from the negotiations and concluded that it would prefer what the OSHA would do unilaterally. The expectation that the OSHA was committed to moving quickly, without waiting for the negotiations, combined with the perception that a unilateral standard from the OSHA would suit labor better than what could be negotiated removed any incentive for labor to continue.

At the same time, some industry constituents were becoming convinced that the OMB would block or delay a standard from the OSHA unacceptable to industry, which made it difficult to achieve unity behind a position.

In the jargon of negotiating theory, the BATNAs of both industry and labor shifted to make a negotiated solution less attractive.

### O. FEDERAL ADVISORY COMMITTEE ACT PROBLEMS

The Department of Labor's regulations relating to the administration of advisory committees restrict flexibility.[193] The OSHA Act and the regulations require preparation of agendas,[194] advance notice of meetings,[195] meetings open to the public,[196] and verbatim transcripts and minutes.[197] The regulations provide less flexibility to accommodate regulatory negotiation than the FACA itself, by failing to authorize closure of a meeting to the public and by requiring a transcript in all cases.

Earlier sections of this part of the article explained that the limited role of the OSHA in the benzene negotiations resulted in part from agency and participant desire not to conduct the negotiations under the FACA. To the extent that the limited role of the OSHA was responsible in part for the failure to reach a consensus on a standard, the FACA was indirectly responsible.

Personnel of the OSHA and their lawyers perceived two impediments to successful negotiation flowing from the FACA. First, the statute and implementing regulations require a charter, approval from the General Services Administration (GSA), advance notice of meetings, and minutes; these requirements slow the negotiation process, and speed was thought to be necessary.[198] Second, and more fundamentally, the FACA and implementing regulations were thought to require that meetings, not only of the full negotiating committee, but also of subgroups and caucuses, be open to the public. This was thought to be inconsistent with good faith negotiation.

Open meetings would hamper good faith negotiations, under this view, because risks to individual participants of making concessions would be increased. In fact, on one occasion in the benzene negotiations, a trade publication reported that an industry representative had said that "we can live with" a PEL of 1 ppm.

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[193] The requirements of the FACA are reviewed in part VIII.G of the article.

[194] 29 C.F.R. § 1912.26 (1985).

[195] *Id.* § 1912.27.

[196] *Id.* § 1912.28.

[197] *Id.* § 1912.33.

[198] Subsequently, the EPA and the FAA were able to satisfy these steps in three to four weeks, with the cooperation of the OMB and the GSA.

As a result of the story, that representative's constituents became alarmed and caused the representative to feel that his job might be threatened. This is an example of constituency problems that some participants thought would be created by open meetings. If representatives feared adverse constituency reaction to concessions, they would make no concessions and there would be no movement from initial postures, making fruitful negotiations impossible.

One participant viewed the open meeting problem, not in terms of constituency relations, but in terms of estoppel or prejudice to future positions if negotiations were unsuccessful. Closed meetings were necessary, under this view, to prevent participants from being embarrassed by the OSHA's knowing what they would be willing to consider to reach agreement. Participation by the OSHA in the negotiations, desirable for other reasons, would have exacerbated this concern. Other participants found the concern with open meetings completely unpersuasive. These participants believed that changes in position would be communicated to the OSHA by other participants, and that the principle of open meetings by advisory committees is valuable.

Some participants suggested that an adequate framework for negotiating occupational safety and health standards exists under the advisory committee provisions of the OSHA Act. Section 7 of the Act[199] authorizes the Secretary to establish two types of advisory committees: National Advisory Committee on Occupational Safety and Health, and advisory committees to assist the Secretary in setting standards. The OSHA, by regulation, had divided the class of standards advisory committees further into "continuing committees" and ad hoc committees.[200] Continuing committees assist with the development of standards in areas where there is frequent rulemaking. Ad hoc committees assist with particular rulemaking proceedings.

The basic authority to establish occupational safety and health standards contained in section 6 of the Act[201] contemplates a role for section 7 advisory committees at the option of the Secretary. If the Secretary requests recommendations from an advisory committee on a contemplated standard, the advisory committee is required to submit its recommendations to the Secretary within ninety days of its appointment. The Secretary may extend or reduce the period for developing recommendations, but it may not exceed 270 days.[202]

When an advisory committee is appointed and the Secretary determines that a standard should be issued, the rule must be published for comment within sixty days after receipt of the committee's recommendations, or the expiration of the deadline for the committee's recommendations.[203] Thereafter, the statutory standard setting process proceeds in the same manner regardless of whether an advisory committee has been involved, with an opportunity for the public to submit written comments and hearings if they are requested in the comments.[204]

The makeup of section 7 advisory committees was addressed by the Seventh

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[199] 29 U.S.C. § 656 (1982).

[200] 29 C.F.R. § 1912.2 (1985).

[201] 29 U.S.C. § 655 (1982).

[202] *Id.* § 655(b)(1).

[203] *Id.* § 655(b)(2).

[204] *Id.* § 655(b)(3)-(4).

Circuit in *National Roofing Contractors Association v. Brennan*.[205] In that case, a trade association of roofing contractors challenged their exclusion from an advisory committee established to advise the Secretary of Labor on safety standards for sloping roofs. The court found that the interests of roofing contractors were represented adequately by general contractors on the committee.[206]

Some personnel of the OSHA and their lawyers thought that coke oven health standards had been negotiated effectively within the section 7 advisory committee framework under the active leadership of Assistant Secretary Eula Bingham. This, in their view, is evidence that successful negotiations can occur under procedures mandated by the FACA and by section 7 of the OSHA Act.

Other participants thought the section 7 process too rigid to accommodate negotiated rulemaking.

### P. UNILATERAL OSHA-PROSPOSED RULE

On December 10, 1985, the OSHA published its own notice of proposed rulemaking (NPRM) to limit benzene exposure in the workplace.[207] The preamble to the NPRM noted that the negotiations had not produced a "joint document,"[208] but otherwise made no substantive reference to the negotiation attempt. As expected, the OSHA proposal included a PEL of 1 ppm, determined over an eight hour TWA.[209] In addition, the NPRM addressed several of the issues raised in the negotiations. Variability in the petroleum industry may, in the final rule, be handled by providing that a single exceedence of the PEL would not necessarily result in a citation, if the employer can show that exposures are below the PEL a large majority of the time by showing the results of at least five eight hour TWA measurements in the same area within a reasonable period of time.[210] The NPRM also granted an exemption to the rubber industry for solvents containing less than 0.5 % of benzene, as agreed by the rubber industry and union representatives.[211] Significantly, the OSHA found a significant risk of occupational disease to exist at exposure levels of 10 ppm but not at 1 ppm under the proposed standard.[212]

On December 10, 1984, shortly after the negotiations had adjourned, the Steelworkers had filed in the United States Court of Appeals for the District of Columbia Circuit a petition for a writ of mandamus, seeking to require OSHA to issue an NPRM for a benzene standard within 30 days of the court's decision, and to issue a permanent standard within seven months after the NPRM.[213] After oral argument, the court ordered the OSHA to submit a timetable for post-NPRM activities.[214] The timetable submitted in response called for OSHA to complete its staff analysis by November 10, 1986.[215] The court denied the petition for faster action on the proposed rule and declined to retain jurisdiction on February 25, 1986.[216]

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[205] 495 F.2d 1294 (7th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).
[206] *Id.* at 1296.
[207] 50 Fed. Reg. 50,512 (1985).
[208] *Id.* at 50,515.
[209] *Id.* at 50,553.
[210] *Id.* at 50,555.
[211] *Id.* at 50,560.
[212] *Id.* at 50,538-39.
[213] United Steelworkers of Am. v. Rubber Mfrs. Ass'n, 783 F.2d 1117, 1119 (D.C. Cir. 1986).
[214] *Id.*
[215] *Id.*

The OSHA told the author by telephone on October 30, 1986, that public hearings on the benzene standard were planned for February, 1987.

## IV. THE FAA FLIGHT AND DUTY TIME NEGOTIATIONS

### A. INTRODUCTION

The Federal Aviation Administration (FAA) utilized negotiated rulemaking to develop revisions to its flight and duty time regulations after two failures to revise the regulations through traditional rulemaking.[217] Negotiations began in the summer of 1983 and resulted in agreement on a proposed rule issued by the FAA in March, 1984.[218] A final rule based on the negotiated agreement was promulgated in July, 1985.[219]

### B. HISTORY OF FLIGHT AND DUTY TIME REGULATIONS

Section 601(a)(5) of the Federal Aviation Act[220] requires that the Administrator of the FAA prescribe reasonable rules and regulations governing in the interest of safety the maximum hours or periods of service for airmen and other employees of air carriers. The FAA promulgated restrictions on flight and duty time in the mid-1950's that remained essentially unchanged, despite substantial changes in aircraft technology and industry structure.[221]

The existing regulations applicable to major scheduled airlines limited annual flight time to 1,000 hours, monthly flight time to 100 hours, and limited flight time in consecutive seven day periods to thirty hours. In addition, the regulation prescribed minimum rest periods.[222] Special rules applied to flag carriers,[223] and supplemental air carriers and commercial operators.[224]

These unchanged regulations, poorly suited for the reality of modern commercial air transportation, generated more requests for interpretations than any other provision of the Federal Aviation Regulations. The agency had issued more than 1,000 pages of interpretations by 1983.

On several occasions in the ten years preceding the regulatory negotiation the FAA made proposals for changing the flight and duty time regulations,[225] but

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[216] *Id.* at 1120.

[217] This was not the first Department of Transportation experience with negotiated rulemaking. In 1982, the Federal Railroad Administration amended rules pertaining to railroad air brakes. The changes resulted from an NPRM adopted at the joint request of the Association of American Railroads, the main industry trade association, and the Railway Labor Executives Association, a confederation of labor organizations representing rail employees. 47 Fed. Reg. 36,792 (1982). Comments submitted in response to the NPRM generally were supportive, resulting in a final rule reflecting the labor-industry agreement. *Id.*

[218] The FAA negotiations are the subject of a study by John N. Nay and John D. Waller of the Performance Development Institute, 600 Maryland Avenue, S.W., Suite 302, Washington 20024, under Transportation Systems Center Contract No. DTRS-57-84-C-00144.

[219] 50 Fed. Reg. 29,306 (1985).

[220] 49 U.S.C. § 1421(a)(5) (1982).

[221] 14 C.F.R. §§ 121.470-.525, 135.261 (1984).

[222] *Id.* § 121.471.

[223] *Id.* § 121.480-.493.

[224] *Id.* § 121.500-.525.

[225] *Id.* § 135.261.

"because of the complexity of the flight time rules and the economic interests affected, none of the past proposals succeeded in resolving the problems to the satisfaction of the affected parties."[226] The 1980 proposal was opposed in part by "virtually all affected segments of the air transportation community"[227] and was withdrawn after it was opposed by the Airline Pilots Association, Alaskan operators, rotorcraft operators, and others.[228]

After these failures to revise the flight and duty time regulations through the traditional rulemaking processes the FAA turned to negotiated rulemaking in early 1983.

### C. PRENEGOTIATION ACTIVITIES

On May 12, 1983, the agency published a notice in the *Federal Register*[229] of its intent to hold a regulatory negotiation through an advisory committee. It solicited comments concerning the issues that it should consider, the interests affected, the membership of the committee, the procedures that should be followed, and other pertinent matters.[230] The notice reported that the FAA already had appointed Nicholas Fidandis, Director, Mediation Services, of the Federal Mediation and Conciliation Service, to act as convenor/mediator. The notice indicated that there had been preliminary inquiry among representatives of affected interests to explore the feasibility of negotiated rulemaking. It concluded that regulatory negotiation could be successful in this instance.

The notice expressed concern, however, that someone might use the regulatory negotiation process "simply to delay the development of an NPRM."[231] It declared that the FAA would proceed to develop an NPRM on its own if the negotiation process failed to produce a consensus, and that the committee would be dissolved by mid-August, 1983, if it was unable to reach agreement by that time.[232] The notice identified eighteen specific issues to be explored in the negotiations and listed the interests and participants.

If a person or interest requested inclusion in the negotiations in response to the notice, the FAA said it would determine (1) "whether that interest would be substantially affected by the rule, (2) if so, whether it would be adequately represented by an individual already in the negotiating group, and (3) whether in any event the requester should be added to the group or whether interests can be consolidated and still provide adequate representation."[233]

The notice declared the intention of the FAA to "issue the negotiated proposal in a notice of proposed rulemaking unless it is inconsistent with the statutory authority of the agency or other statutory requirements, or it is not appropriately justified."[234] The notice said, "For the process to be successful, the interests represented should be willing to accept the final product of the advisory committee."[235]

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[226] Notice of Proposed Rulemaking, 49 Fed. Reg. 12,136, 12,137 (1984).
[227] 48 Fed. Reg. 21,339, 21,340 (1983).
[228] *Id.* at 21,340.
[229] *Id.* at 21,339.
[230] *Id.*
[231] *Id.* at 21,343.
[232] *Id.*
[233] *Id.* at 21,341.
[234] *Id.*

### D. ESTABLISHMENT OF NEGOTIATING COMMITTEE

On June 28, 1983, the FAA published a final notice[236] establishing an advisory committee for the negotiations. It rejected some requests for membership on the negotiating committee but added representatives of six groups.

It noted that nonmembers of the committee would be given an opportunity to present information to the committee and that all interested individuals or organizations would be given full opportunity to comment on the NPRM.

### E. SUITABILITY OF SUBJECT MATTER

The flight and duty time rulemaking was well suited for negotiated rulemaking. The number of interests were manageable; ultimately eighteen participants were involved.[237] The issues were mature, having been subject to discussion and unsuccessful notice and comment rulemaking over a period of more than twenty years.[238] Furthermore, fundamental values were not perceived as involved. Flight and duty time restrictions have obvious safety implications, but participants agreed that tradeoffs were appropriate among requirements aimed at increasing safety.[239] Also, the correct form of an ultimate rule was not determinable as a matter of objective scientific evidence.[240] The principal disputes related to accommodating the details of a rule to operations requirements in a variety of carrier environments.

In addition to satisfying the Harter criteria, other factors indicated the possibility of successful negotiation. Chief among these was the lack of success of the FAA with two NPRMs on the subject within the preceding seven years. The first was withdrawn because of opposition from industry. The second was withdrawn because of opposition from the Airline Pilots Association.[241] Recent experience therefore reinforced party perceptions that the FAA might promulgate something unacceptable to its interests, a perception that is a prerequisite to negotiated agreement.[242]

### F. INCENTIVES TO PARTICIPATE

The labor interests had an incentive to participate because they wanted an enforceable rule, applicable to both major (part 121) and minor (part 135) carriers.[243] They believed negotiation was the only foreseeable way to get this rule.

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[235] *Id.*

[236] 48 Fed. Reg. 29,771 (1983).

[237] This satisfied Harter's second criterion and ¶ 4(c) of ACUS Recommendation 82-4. Part II.c of the article discusses Harter's criteria for negotiated rulemaking and ACUS Recommendation 82-4.

[238] This satisfied Harter's third criterion and ¶ 4(a) of ACUS Recommendation 82-4.

[239] This satisfied Harter's sixth criterion and ¶ 4(b) of ACUS Recommendation 82-4.

[240] This satisfied Harter's eighth criterion.

[241] This implicates Harter's first criterion and ¶ 4(e) of ACUS Recommendation 82-4, relating to countervailing power.

[242] This implicates Harter's fifth criterion, opportunity for gain, and is central to the BATNA concept.

[243] *See* 14 C.F.R. pt. 121 & 135 (1986) (part 121 applies to trunk carriers; part 135 applies to commuter carriers).

Traditional rulemaking had not produced any changes in more than twenty years.

Part 135 carriers were not unhappy with the status quo, but they were convinced that some new rule covering their operations was inevitable, and they wanted to influence the content of the rule.

Part 121 carriers, represented by the Air Transport Association (ATA), initially were reluctant to participate, presumably because they were satisfied with the status quo. Ultimately, however, the FAA convinced them and others that it would issue a rule and would proceed with negotiations in the absence of the ATA, possibly inducing individual part 121 carriers to participate or proceeding without part 121 carrier representation in the negotiations at all.

The FAA was inclined to participate because of frustration with the traditional process, and a perception that a unilaterally promulgated rule would be easier to defend if the parties tried and failed to develop their own rule. Moreover, the FAA thought that it could blunt criticism of the agency's efforts if the critics were themselves unable to develop a regulation.

### G. INTRACONSTITUENCY DIFFERENCES

Few intraparty problems were manifest in the negotiations. One would expect that the trunk carriers would have disagreed among themselves, but ATA, once it decided to participate seriously in the negotiations, convened a meeting of sixteen carriers and hammered out a proposal all the carriers could accept.

The FAA, however, experienced some internal problems. Program staff were inclined to prefer a rule requiring more rest than that preferred by the legal staff. Midway through the negotiations a new FAA Administrator was appointed who had been involved as a member of the National Transportation Safety Board (NTSB) in developing flight and duty time recommendations. After the initial negotiations were concluded and the NPRM published, the internal FAA critics of the proposed rule were able to induce the new Administrator to make changes in the proposed rule.

### H. THE NEGOTIATIONS

The advisory committee held sixteen days of formal meetings between June 29 and September 26, 1983. More than thirty informal meetings of subgroups also occurred. The results of the negotiation are aptly summarized by the FAA in the resulting NPRM:

> The committee . . . thoroughly discussed the major issues involved in the regulation of flight time limits. Numerous proposals and justifications were drafted by participants and submitted to the committee for review. . . . Although the committee did not reach consensus on any particular proposal, its deliberations were successful because committee members gave serious consideration to and entered into candid discussion of the various proposals and justifications submitted to them. Thus the committee succeeded in narrowing the differences among parties and in reaching substantial agreement on some issues. In addition, the committee identified major areas of concern and all parties obtained significant, new information on a subject which has been dis-

cussed, without resolution, for years.[244]

After the September 26, 1983, committee meeting, the FAA took responsibility for the production of an NPRM, which the committee reviewed on February 14, 1984. The NPRM memorialized consensus resolution of some issues and offered the FAA's independent judgment on other issues about which consensus had not been reached, informed by the FAA's presence in the negotiating sessions. In the February 14 meeting, a majority of the committee members recommended publishing the NPRM in the *Federal Register* as submitted. Several members of the committee dissented from this recommendation because they wanted to address certain issues that had not been resolved to their satisfaction before the NPRM was published.[245]

On March 28, 1984, the FAA published the NPRM as submitted to the committee, with certain modifications in the preamble to address issues not resolved by the negotiators.[246] Interested parties had forty-five days to comment on the NPRM.[247] The FAA synthesized the comments and presented them to the committee on September 11, 1984.[248] The agency incorporated input received at this meeting, made additional changes, and submitted a draft final rule to the OMB.

### I. FINAL RULE

The FAA promulgated the final flight and duty time rule on July 18, 1985.[249] The rule included certain changes from the NPRM, and was accompanied by slightly more than 350 column inches of preamble.

The FAA discussed the use of negotiated rulemaking in a background section at the beginning of the preamble, terming it "essential in achieving the highly successful result that is apparent in these amendments."[250] The remainder of the preamble, however, primarily addressed the substance of the rule, explaining the rationale of the FAA and evaluating the merits of the 140 comments received during the forty-five day comment period.[251] Written comments submitted by interests represented on the negotiating committee were, according to the FAA, largely restatements of their negotiating positions.[252] In some instances, the FAA justified aspects of the rule by referring to the activities of the negotiating committee, but only fifty column inches—less than fifteen percent of the total preamble— were devoted to discussion of the negotiation process in support of the rule.

The agency did meet objections to the short comment period, however, by pointing to the fact that the meetings of the negotiating committee were open to the public and to the fact that the negotiators heard oral presentations by nonmembers of the committee at its September 11, 1984, meeting.[253]

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[244] 49 Fed. Reg. 12,136, 12,137 (1984).
[245] *Id.* at 12,137-38.
[246] *Id.* at 12,136.
[247] This was a significantly shorter comment period that is usually afforded in traditional rulemaking.
[248] Flight Time Limitations and Rest Requirements, 50 Fed. Reg. 29,306, 29,306 (1985).
[249] *Id.* at 29,306.
[250] *Id.*
[251] *Id.* at 29,307-08.
[252] *Id.*
[253] *Id.* at 29,307.

The agency made the following major changes in the NPRM:

(1) Based on comments from operators, it increased the weekly flight time limitation of 32 hours imposed on part 135 operators to 34 hours. The FAA noted that 34 hours was "within the range of weekly flight hour limitations discussed" during the negotiation process.[254]

(2) It eliminated proposed section 121.471(h), relaxing limitations for part 121 operators flying propeller driven aircraft with seating capacities between 31-60. The proposed paragraph (h) was not the product of consensus in the negotiations, but was included at the request of the Regional Airlines Association, which had proposed it in negotiations. Comments on paragraph (h) were split 27-27, with regional carriers favoring the provisions and regional pilots and their organizations opposing it. The agency concluded that safety considerations militated in favor of deleting the provision and requiring regional operations involving small aircraft larger than 30 passengers to conform to part 121 limitations, even though this would subject some regional operators to different limitations for their part 121 and 135 operations.[255]

(3) The proposed nine hour limitation on scheduled flight time between rest periods was changed to eight hours. The nine hour proposal was not the result of consensus among the negotiators, but was a compromise figure arrived at by the FAA.[256] Based on comments submitted by pilots objecting to the nine hour limitation, and on the absence of information on the benefits of a nine hour cap invited by the FAA but not submitted by carriers, the agency reverted to an eight hour limitation in the final rule.[257]

(4) The proposed floor of 7.5 hours on the duration of rest periods was increased to 8 hours, based on comments from pilots and consumer groups opposing the shortened rest period.[258]

(5) Language was added requiring that "compensatory rest"[259] begin within twenty-four hours after commencement of the reduced rest period.[260] This change represented a clarification of an issue raised at the last negotiating committee meeting, and was, in the FAA's opinion, consistent with the intent reflected in the negotiated proposal.[261]

(6) Part 135 operators conducting both scheduled and unscheduled operations are permitted under the final rule to conduct all operations under the rules for scheduled operations, after obtaining an appropriate operations specification amendment.[262] This represented an addition to the proposed rule in response to comments from part 135 operators objecting to the administrative burden of conducting their operations under different rules.

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[254] *Id.* at 29,309.

[255] *Id.* at 29,310.

[256] *Id.*

[257] *Id.* at 29,311.

[258] *Id.* at 29,312.

[259] "Compensatory rest" is additional rest to make up for reduced rest, below the normal minimum of nine hours, down to the revised floor of eight hours, given at the next proceding rest period.

[260] 50 Fed. Reg. 29,306, 29,312 (1985).

[261] *Id.* at 29,312.

[262] *Id.* at 29,315.

### J. DYNAMICS OF NEGOTIATION AND REASONS FOR SUCCESS

The negotiations moved slowly until the FAA submitted a draft rule to the participants. This reinforced the view that the FAA would move unilaterally. It also reminded the parties that there would be things in a unilaterally promulgated rule that they would not like—thus reminding them that their BATNAs were worse than what was being considered at the negotiating table.

Participation by the Vice President's Office, the Office of the Secretary of Transportation, and the OMB at the initial session discouraged participants from thinking they could influence the contents of the rule outside the negotiation process. One attempt to communicate with the Administrator while the negotiations were underway was rebuffed.[263]

The participants tacitly agreed that it would not be feasible to develop a "total package" to which the participants formally could agree. Instead, their objectives were to narrow differences, explore alternative ways of achieving objectives at less disruption to operational exigencies, and educate the FAA on practical issues. The mediator had an acute sense that the negotiation process should stop before agreement began to erode. Accordingly, he forbore to force explicit agreement on difficult issues, took few votes, and adjourned the negotiations when things began to unravel. In addition, the FAA, the mediator, and participants were tolerant of the political need of participants to adhere to positions formally, even though signals were given that participants could live with something else.

Agency participation in the negotiating sessions was crucial to the usefulness of this type of process. Because the agency was there, it could form its own impressions of what a party's real position was, despite adherence to formal positions. In addition, it was easy for the agency to proceed with a consensus standard because it had an evolving sense of the consensus. Without agency participation, a more formal step would have been necessary to communicate negotiating group views to the agency. Taking this formal step could have proven difficult or impossible because it would have necessitated more formal participant agreement. In addition, the presence of an outside contractor who served as drafter was of some assistance. The drafter, a former FAA employee, assisted informally in resolving internal FAA disagreements over the proposed rule after negotiations were adjourned.

### K. THE FACA ISSUES

The negotiation group was chartered as an advisory committee, held public meetings, published minutes, and otherwise complied with the FACA.[264] Sensitive matters were handled in caucus or through other informal means without serious objection. In the view of some participants, the public nature of the negotiations was an advantage. It permitted the agency to respond to later critics of the rule by noting they had a chance to present their views, not only by responding to the original *Federal Register* notice and through the section 553 notice and comment process, but also by coming to the meetings. In fact, the NTSB and a group of commuter pilots made formal presentations to the participants at one of the later meetings.

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[263] This conclusion is based on interviews with Department of Transporation personnel who participated in the negotiations.

[264] Part VIII.G of the article discusses more generally the FACA.

### L. THE APA ISSUES

The FAA did not believe that it had delegated its authority to the negotiators, despite its commitment to publish a consensus rule. Because it was a participant in the negotiations, it could forestall consensus, and thus relieve itself of the obligation to publish a rule that in its view was inappropriate.

*Ex parte* contact after the negotiations had adjourned, to check out the acceptability of changes being made in response to comments and to the views of the new FAA Administrator, was considered to be well within the limitations of *Home Box Office v. FCC*[265] and *Sierra Club v. Costle*.[266] Factual information was not being sought or received; the only information sought was reaction to agency exercise of policy discretion. Moreover, any alternatives presented in these conversations were supportable by the record and could satisfy the arbitrary and capricious standard of review that courts use in reviewing agency action. Therefore the alternatives were not dependent on the contents of the *ex parte* communications.

## V. ENVIRONMENTAL PROTECTION AGENCY NEGOTIATIONS

### A. INTRODUCTION

The Environmental Protection Agency (EPA) has shown particular enthusiasm for regulatory negotiation. It has used negotiated rulemaking successfully to develop two proposed rules, one dealing with nonconformance penalties (NCPs) for vehicle emissions and another dealing with emergency exemptions from pesticide regulations.[267]

### B. THE NEGOTIATION PROJECT

In February, 1983, the EPA announced a "Regulatory Negotiation Project."[268] The announced purpose of the project was to test (1) the utility of developing regulations by negotiation; (2) the types of regulations most appropriate for negotiated rulemaking; and (3) the procedures and circumstances that foster the most effective negotiations.[269] The EPA published a notice in the *Federal Register* to solicit suggestions for regulations that might be candidates for negotiated rulemaking, requesting reference to summary criteria derived from ACUS Recommendation 82-4.[270]

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[265] 567 F.2d 9 (D.C. Cir.) (per curiam), *cert. denied*, 434 U.S. 829 (1977). This case is discussed in parts VIII.D, hybrid rulemaking, and VIII.E, *ex parte* communication.

[266] 657 F.2d 298 (D.C. Cir. 1981).

[267] The EPA has also used negotiated rulemaking for agricultural pesticides. *See* Intent To Form an Advisory Committee To Negotiate Proposed Farmworker Protection Standards for Agricultural Pesticides, 50 Fed. Reg. 38,030 (1985) (notice of intent to use negotiated rulemaking to develop an NPRM for Farmworker Protection Standards). This initiative and other EPA negotiation proposals are discussed in part VI.E.

[268] 48 Fed. Reg. 7,494 (1983).

[269] *Id.*

[270] *Id.* at 7,495.

The EPA considered and rejected negotiation of a number of rules suggested as candidates.[271] Candidates were rejected for timing reasons, because they involved too many different interests, because they involved complex, unsettled questions of science, or because they involved "generic" issues too complicated to be broken down into negotiable components.[272] One environmental group suggested NCPs as one of several candidates for regulatory negotiation.[273]

### C. NONCONFORMANCE PENALTIES

In April, 1984, the EPA announced its intention to use negotiated rulemaking to develop an NPRM on nonconformance penalties (NCPs) for heavy duty vehicles under section 206(g) of the Clean Air Act.[274] Negotiations resulted in agreement on an NPRM issued eleven months later.[275]

#### 1. Background of Nonconformance Penalties

The Clean Air Act authorizes the EPA to set emissions limits for motor vehicles. Section 206(g) of the Act requires the EPA to issue certificates of conformity to any class or category of heavy duty vehicles or engines exceeding an emission standard but within an upper limit associated with the standard if the manufacturer pays an NCP. The penalty approach was intended to mitigate the adverse effects of "technology forcing standards," by permitting technological laggards to sell their engines or vehicles by payment of a penalty, while avoiding competitive disadvantage to technological leaders.[276]

The EPA proposed NCPs in two traditional rulemakings. In 1979, the agency proposed NCPs as part of its regulation for 1983 and Later Model Year Heavy-Duty Engines,[277] and as part of its Gaseous Emission Regulations for 1983 and Later Model Year Light-Duty Trucks.[278] The proposals avoided establishing NCPs for hydrocarbon (HC) and carbon monoxide (CO) because of the EPA's belief that manufacturers could meet emission standards. In 1983, as part of the Reagan Administration's regulatory relief initiatives, the agency relaxed the HC and CO emission standards, obviating, in the view of the EPA, the need for NCPs in the final regulations.[279] The EPA nevertheless believed NCPs might be necessary for oxides of nitrogen (NOx) and particulate standards scheduled to be effective in 1978, and for previously promulgated standards, if standards for other pollutants subsequently made compliance more difficult.[280]

In *Natural Resources Defense Council v. Ruckelshaus*,[281] the district court set a timetable forcing the EPA to promulgate Phase I NCP rules by August 31, 1985, and Phase II rules by December 31, 1985. Phase I rules were to address when NCPs would be made available, how upper limits would be chosen, the general formula for calculating the penalties, and procedures for testing the degree of emissions nonconformity.[282] Phase II would apply the Phase I concepts to determine particular emissions standards for which NCPs would be available, specific upper limits, and numerical values for the variables in the penalty rate formula for particular subclasses of engines.[283]

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[271] 49 Fed. Reg. 17,576, 17,579 (1984).

[272] The process leading to the rejection of the rule governing disposal of low level radioactive waste as a candidate has been investigated in detail. *See* D. Fish & L. Suskind, The Prenegotiation Phase of Regulatory Negotiation: The Case of the Low-Level Radioactive Waste Rule (unpublished manuscript).

[273] McGlennon, *Negotiating Regulations: Success at EPA*, in A.L.I.-A.B.A. COURSE OF STUDY: ENVIRONMENTAL LAW 489 (Feb. 14-16, 1985).

[274] 42 U.S.C. §§ 7401-7642 (1982 & Supp. III 1985); 49 Fed. Reg. 17,576 (1984).

[275] 50 Fed. Reg. 9,204 (1985).

[276] *Id.*

[277] *Id.* at 9,205 (citing 44 Fed. Reg. 9,464 (1979)).

[278] *Id.* (citing 44 Fed. Reg. 40,784 (1979)).

[279] *Id.* (citing 48 Fed. Reg. 1,413, 1,424 (1983)).

[280] *Id.*

[281] No. 84-748 (D.D.C. Sept. 14, 1984).

### 2. Prenegotiation Activities

A Nuclear Resources Defense Council representative suggested NCPs as a candidate for negotiated rulemaking. The convenor retained by the EPA, ERM-McGlennon Associates, and the EPA conducted prenegotiation efforts aimed at determining whether NCP was a suitable candidate, and at identifying appropriate participants for the negotiation. The process began with the program office of the EPA. Once program office support was assured, the convenor called forty-seven representatives of manufacturing, consumer, environmental, state, agency, and industry association interests.[284] These representatives generally expressed support for the negotiation project. The convenor also met personally with a smaller number of representatives to assess issues, interests, and positions.

On the basis of these contacts the EPA decided to proceed with negotiated rulemaking for the NCP rule. The EPA began the process by sponsoring an organizational meeting at which participants met each other and discussed procedural and logistical issues such as frequency and location of negotiations, agenda formulation, and minutes. Potential participants had shown a willingness to negotiate before the organizational meeting; the purpose of the meeting was to prevent surprises once substantive negotiations got underway.

The convenor obtained final participation commitments from participants and organized a six hour training session before the first actual negotiating session.[285] The goals of the training program were to:

(1) educate participants on the fundamentals of environmental negotiations;

(2) improve participant awareness of the dynamics of negotiations;

(3) develop negotiating skills and techniques; and

(4) assist participants in understanding the different interests that would be represented at the negotiating table.[286]

Over twenty negotiators attended the organizational meeting. At the meeting, ERM-McGlennon proposed a simple set of operating protocols: (1) decision-making by consensus; (2) no contact with the press during negotiations; and (3) agreement on a deadline for concluding negotiations. The proposal was intended to be broad enough to allow participants to create specific protocols and thus "own" the first agreement of the process. The negotiators were content to modify the general guidelines drafted by ERM-McGlennon.

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[282] 50 Fed. Reg. 9,204, 9,205 (1985).

[283] *Id.*

[284] McGlennon, *supra* note 273. McGlennon was the convenor for the NCP negotiation.

[285] *Id.* at 492.

[286] *Id.*

The group discussion over resource pool protocols was far more extensive. The resource pool protocols were designed for the administration of a $50,000 fund[287] designed to defray the extraordinary expenses of participating in the negotiations and to support any necessary research or technical analysis required during the negotiation process. After extensive discussions, the committee reached a consensus on how to administer the pool, how to manage contracts, and how to distinguish between federal and private funds in the pool.[288] The committee agreed that individual stakeholder requests would be reviewed by the entire group and managed by an independent organization. In the NCP negotiations, the pool was administered by the American Arbitration Association under the direction of an NCP work group.

### 3. Establishment of the Negotiating Committee

In its April, 1984, *Federal Register* notice the EPA articulated its reasons for selecting the NCP rule for negotiation,[289] identified key issues for the negotiation, and proposed participants.[290] The notice solicited requests by other persons wishing to participate, requiring such requests to be accompanied by an explanation of the requester's interests and a showing of why representation of that interest was not adequately provided for in the proposed composition of the negotiating committee. It said that such requests would be evaluated according to the following criteria:

(1) whether the requester would be substantially affected by the rule;

(2) whether the requester was already adequately represented in the negotiating group; or

(3) whether the requester should be added to the group for other reasons.[291]

Issues to be addressed in the negotiations were identified.[292] The notice listed various manufacturers, industry associations, and environmental groups as proposed parties to the negotiations.[293] Only one of the proposed participants did not participate in the negotiations. Three parties were later added to the committee. The total membership of the committee included twenty-three participants.

### 4. Incentives to Participate

Environmental groups participated in the negotiations because they favored NCPs and thought negotiations would result in NCPs. NCPs would make it easier for the EPA to promulgate emission standards based on "leader technology."[294] In the absence of NCPs, these groups believed, the EPA would be inclined to set lower standards, so a greater portion of the industry could meet them. Thus, NCPs represented an escape valve that would permit tougher standards. In addition, the litigation strategy of these groups was enhanced by regulations providing for NCPs. NCPs create an alternative for laggards other than going out of business, thereby mitigating impracticability arguments in industry challenges to standards. Laggard manufacturers had an incentive to participate to ensure that NCPs were as low as possible. Leader manufacturers had an incentive to participate to ensure that NCPs were as high as possible to reduce the competitive advantage that otherwise might accrue to laggard manufacturers.

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[287] Half the money came from the EPA. The remainder that the EPA helped arrange came from private sources. The National Institute for Dispute Resolution assisted in designing and administering the resource pool.

[288] The discussion of the prenegotiation phase is heavily borrowed from McGlennon, *supra* note 273, at 492-94.

[289] The *Federal Register* notice discusses how NCPs meet Harter's criteria for negotiated rulemaking.

[290] Intent To Form Advisory Committee To Negotiate Nonconformance Penalty Regulations, 49 Fed. Reg. 17,576, 17,577 (1984).

[291] *Id.* at 17,577.

[292] *Id.*

[293] *Id.* at 17,578.

[294] "Leader technology" is that technology possessed by the most advanced member of the industry.

### 5. Intraconstituency Problems

Intraparty disagreements were minimal in the NCP negotiations because the relatively small number of heavy duty vehicle manufacturers made it possible to have virtually all of them as participants.

Intraconstituency disagreements were also minimal within the environmentalist community. A relatively stable coalition of environmental groups had developed over the years, essentially delegating representational authority to one or two staff members who handled certain regulatory issues on behalf of the environmental movement as a whole. Such delegation was necessitated by resource limitations.

### 6. The Negotiations

Negotiations began on June 14, 1984, and concluded on October 12, 1984.[295] They were conducted under a federal advisory committee charter. Committee meetings were open to the public and noticed in the *Federal Register*.[296]

The EPA hired a contractor to study the NCP negotiation process.[297] The contractor surveyed participants at the beginning and end of the negotiations.[298] The results of the surveys can be summarized as follows:

(1) Many participants were concerned at the outset that the negotiating process would be more trouble than it was worth, but they were generally satisfied with the result.

(2) Participants were particularly concerned about what role the EPA would play as a participant, and expressed some criticism at the end of the negotiations that the EPA was too passive, especially regarding technical data.

(3) There was a range of enthusiasm for the process. Vehicle manufacturers had more enthusiasm than other participants. Support for the process seemed to correlate with a perception that it decreased adversarial postures and promoted deeper understanding of the issues and trade offs involved.

(4) Multiple representatives of an interest, or of similar interests, were perceived as reducing power, because of the need to promote and retain consensus among the representatives. The single environmental group representative was perceived as having the most power.

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[295] 50 Fed. Reg. 9,204, 9,205 (1985).

[296] *Id.* at 9,205.

[297] The EPA hired Prof. Lawrence Susskind of the Massachusetts Institute of Technology.

[298] The results of Prof. Susskind's study are available from Chris Kirtz, Director of the Regulatory Negotiation Project, U.S. Environmental Protection Agency.

(5) Some participants thought that litigation might be a more resource efficient way for public interest groups to influence rulemaking than participation in negotiations. Almost everyone agreed that participation in the negotiations required substantial resources, and that environmental groups have fewer resources than other institutional interest representatives.

(6) Some participants expressed the view at the outset that a benzene type consensus guideline was desirable.[299] No concern about the more flexible consensus rule actually used was expressed at the end of the negotiations.

(7) In general, support was expressed for participation by the OMB.

(8) Some participants suggested that it would have been useful to have appointed a neutral technical expert who could have assisted in evaluating data while shielding proprietary data from disclosure to competitors or the public.

Toward the end of the negotiations, the EPA made available to the negotiators a microcomputer with software that permitted negotiators to evaluate the impact of different regulatory options. Most of the participants thought this helpful.

### 7. Postconsensus Process

The committee reached consensus on the core conceptual issues on October 12, 1984. The proposal of the EPA, based on the group's consensus, appeared in the *Federal Register* on March 6, 1985.[300] Only thirteen comments were received. All were from participants and all supported the consensus proposal. Six specifically requested additional negotiations.

### 8. Final Rule

The Phase I NCP rules were promulgated in final form on August 30, 1985.[301] The EPA provided independent justification for the rule, referring to the negotiated rulemaking, but did not rely on the consensus reached in negotiations to justify the contents.

## D. PESTICIDE EXEMPTIONS

The EPA used negotiated rulemaking successfully a second time in revising regulations to implement exemptions to pesticide regulations. Negotiations proceeded from late 1984 to early 1985, resulting in agreement on a proposed rule published in the spring of 1985 and a final rule published in January, 1986.

### 1. Background

Section 18 of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)[302] gives the Administrator of the EPA the discretionary authority to exempt any federal or state agency from any provision of the FIFRA if the Administration determines that emergency conditions require it. Regulations implementing section 18 were promulgated in 1973[303] and were not changed.[304]

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[299] *See* part III.L of the article. This guideline prohibits written communication from the negotiation group to the agency unless a consensus emerges on all matters of concern.

[300] 50 Fed. Reg. 9,204 (1985).

[301] 50 Fed. Reg. 35,374 (1985).

[302] 7 U.S.C. § 136w (1982).

[303] 40 C.F.R. pt. 166.

In the fall of 1982, the EPA Office of Pesticide Programs conducted a review of the regulations and programs to grant state and federal agency exemptions. The review and audit raised four concerns about section 18 regulations.[305] In addition, the House Subcommittee on Department Operations, Research and Foreign Agriculture expressed concern that states or industry might be using section 18 to circumvent the stringent data and risk control requirements of the Act.[306] In January, 1984, the EPA began to consider revisions in the regulations and held three public hearings to solicit the public's views in preparation for issuing proposed revised regulations.[307] After the hearings, the EPA decided to explore negotiated rulemaking as the procedure for developing revised regulations.[308]

### 2. Formation of the Negotiating Committee

In August, 1984, the EPA published a *Federal Register* notice declaring its intent to form an advisory committee to develop new section 18 regulations.[309] The notice reported that the EPA had contacted affected interests and that they were interested in participating in negotiations. The notice identified a list of issues to be considered in the negotiations.[310] The notice also identified environmental groups, state organizations and officials, federal agencies, user groups, and manufacturers and processors as tentative parties.[311]

The notice invited requests for participation, to be accompanied by an explanation of the interest to be represented and a showing of why the interest would not be represented adequately by the proposed participants.

The notice reported the intent of the EPA to use any consensus reached in the negotiation as the basis for an NPRM, "unless it is inconsistent with our statutory requirements, or it is otherwise unjustified."[312] It also limited the negotiation process to four months. If the committee did not reach consensus by January 28, 1985, the committee would be terminated and the EPA would proceed on its own to develop a revised regulation.[313] A number of groups were added to the negotiating committee after the August, 1984, notice.[314]

### 3. Prenegotiation Preparations

ERM-McGlennon Associates served as the convenor for the pesticide negotiations, though an in-house facilitator was used after the negotiations began. In a manner similar to the NCP negotiations, a training session was held and conve-

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[304] 50 Fed. Reg. 13,944 (1985).

[305] *Id.*

[306] 50 Reg. 13,944 (1985) (discussing House Subcommittee on Department Operations, Research and Foreign Agriculture, Regulatory Procedures and Public Health Issues in the EPA's Office of Pesticide Programs (Dec. 17, 1982)).

[307] 50 Fed. Reg. 13,944 (1985).

[308] *Id.*

[309] 49 Fed. Reg. 31,145 (1984). The *Federal Register* notice explained why the pesticide exemption rules met Harter's criteria for negotiated rulemaking.

[310] *Id.* at 31,147.

[311] *Id.* at 31,148.

[312] *Id.* at 31,146.

[313] *Id.* at 31,147-48.

[314] The original notice listed fewer participants, *id.*, than were eventually members. 50 Fed. Reg. 13,944, 13,945 (1985).

nor-drafted protocols were discussed. Because of the utility of the organizational meeting in the NCP negotiations, the program office for the section 18 rule specifically requested an organizational meeting. Protocols were less controversial in the pesticide negotiations than in the NCP negotiations. The pesticide exemption committee's resource pool was managed by the National Institute for Dispute Resolution.[315]

### 4. Incentives to Participate

The issues involved in section 18 exemptions involved conflict among interests. Agricultural interests generally favored a more permissive exemption policy, though there were different concerns among agricultural groups depending on crop and region of the country. States generally favored a more permissive exemption policy, though sharp differences existed between health and agricultural agencies within a particular state. Environmental groups tended to favor a more restrictive exemption policy.

The inevitability of change created an incentive for all groups to participate in shaping the change. The existing program appeared to be collapsing. Between 1976 and 1982 there had been a 750% increase in self-administered "crisis exemptions." The congressional staff study had concluded that changes in the regulation were necessary.[316]

### 5. The Negotiation

The full committee met four times. The committee divided into three working groups that met separately from the full committee. Working group results were considered at full committee meetings. The full committee developed the consensus on the preamble and the proposed rule.

An early ground rule, insisted upon within the committee, was that a consensus be reflected by commitment to a formal document. Otherwise, participants were unwilling to invest the time to participate in the negotiation. The ultimate commitment to support the consensus document before the agency emerged in the last negotiating session.

The facilitator was from the Office of General Counsel of the EPA. Thus the pesticide exemption negotiation is the only completed negotiated rulemaking in which an internal facilitator was used.

### 6. Postconsensus Process

On January 16, 1985, the committee reached full consensus on the exact wording of text and preamble of the NPRM. The EPA published the NPRM on April 8, 1985. Nineteen comments were received. Three were from participants and supported the proposal. The other comments raised relatively minor points.

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[315] The EPA contributed half the total amount, and the National Institute for Dispute Resolution contributed the remainder.

[316] 50 Fed. Reg. 13,944 (1985).

### 7. Final Rule

The final rule was published on January 15, 1986.[317] Comments on the proposed rule were received from nineteen sources.[318] The EPA's discussion of the comments in the preamble to the final rule referred to the negotiations with respect to two of the comments, but otherwise offered EPA's own rationale in support of the final rule.

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[317] *Id.*; 51 Fed. Reg. 1896 (1986).

[318] *Id.*

## VII. COMPARATIVE ANALYSIS

The four negotiations studied were different in subject matter, power of parties, cohesiveness of interests represented, procedure followed, and commitment and competence of the sponsoring agencies.

Only the EPA formally solicited suggestions for candidates for negotiated rulemaking. This canvass shifted the burden to major interest groups to propose subjects on which they would be willing to negotiate, even as they rejected other subjects. The agencywide initiative may have some benefits in terms of communicating clear agency support for the concept. It also raised fears among some affected interests, however, that the EPA was overly committed to a process and might force its use without sufficient consideration for its utility in a particular proceeding.

The EPA picked subjects that had not already failed in traditional rulemaking processes. The OSHA and the FAA picked subjects for negotiation that had proved intractable in traditional rulemaking and judicial review.[363] Other differences between the history of the benzene rulemaking effort and the history of the flight and duty time effort, however, made benzene a riskier candidate than flight and duty time. No one involved in the flight and duty time, NCP, or pesticide controversies really believed that a rule could be determined by objective examination of scientific data. At least some of the benzene participants believed that the matter was simply one of analyzing scientific data. This inhibited realistic exchange of concessions in the benzene negotiations because of an underlying perception that the correct standard could be determined objectively rather than through bargaining.

BATNAs[364] in the benzene negotiation were relatively attractive, reducing incentives to negotiate. The benzene litigation had exaggerated points of disagreement and led to divergent perceptions of what the OSHA was expected to do in response to the Supreme Court's decision. Labor expected action by the OSHA similar to the rule invalidated by the Supreme Court; industry expected it could block this standard in litigation or in the OMB clearance process. Thus each side perceived a relatively favorable BATNA, reducing the incentives to negotiate.

BATNAs in the flight and duty time negotiation, by comparison, were relatively unattractive. The FAA's unsuccessful attempts at flight and duty time rulemaking had convinced the participants that unilateral FAA action could be harmful to their interests.

Somewhat surprisingly, there was little controversy over who should participate in the negotiations. In all of the initiatives except the one involving benzene, the agencies published lists of proposed participants, permitting excluded interests to make a showing of why they should be added to the negotiating group.[365] Agencies experienced no difficulties with this approach. The benzene effort might have benefitted from a similar approach to identify participants.

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[363] Both approaches are consistent with ACUS Recommendation 82-4, 47 Fed. Reg. 30,708, 30,709-10 (1982).

[364] Part II.B.1 of the Article explains the BATNA concept.

[365] This approach is recommended by ¶ 7 of ACUS Recommendation 82-4, 47 Fed. Reg. 30,708, 30,709-10 (1982).

The benzene negotiations would have proven less difficult if some labor unions not participating could have been involved to a greater degree instead of objecting to aspects of a potential agreement from the sidelines. In the benzene negotiation, one problem was failing to include everyone who had the incentive and the power to block a negotiated resolution.

The process of identifying participants in the flight and duty time negotiation focused on potential intraconstituency disagreements within the major airline industry association, creating an incentive for the association to address such disagreements. Less attention was paid to intraconstituency disagreements at the threshold of the OSHA negotiation.

Some participants in the NCP negotiations, particularly environmental groups, may have found the negotiation process relatively more attractive than participants in the benzene or flight and duty time negotiations because some NCP participants perceived themselves as having relatively little influence with the EPA through notice-and-comment or hybrid rulemaking and more influence through the negotiation process. In contrast, organized labor has long enjoyed substantial informal influence with Labor Department agencies. Therefore negotiations threatened to lessen labor's relative power advantage. The airline and pilot organizations similarly have considerable power to affect FAA policy, but each side perceived its opponent as having equivalent power.

It is difficult to conceive how any of the four negotiations would have worked at all without the help of the facilitator/mediators. All three agencies used both convenors and mediators.[366] In some cases the convenor became the facilitator or mediator; in other cases, the facilitator or mediator was a different person from the convenor. The facilitator/mediators played different roles in the four negotiations. Those involved in the benzene negotiation were less active in the formal benzene meetings and more active outside the formal negotiating sessions than the other neutrals. The mediator in the flight and duty time negotiations concentrated his effort on formal negotiating sessions and caucuses. He was characterized as being "phenomenally effective" in caucuses. Despite the differences in styles, involvement of the facilitator/mediators almost certainly was essential to keep all of the negotiations moving.[367] Few participants or observers thought that either external or internal facilitator/mediators have advantages over the other. Instead, mediation experience and competence was considered important. Mediator skills involve more than getting along well with people; they involve an instinctive awareness of group functioning and how to move toward closure.

The most striking difference between the benzene negotiations and the other negotiations is that the OSHA did not participate in the benzene negotiations, while agencies did participate in the other negotiations.[368] Agency participation militated against harmful divergence in expectations about what the agency would do unilaterally, and therefore conditioned BATNAs to maintain incentives for negotiated agreement. In the benzene negotiation, the participants came to believe they would do better outside the negotiations, working directly with the OSHA or OMB, and therefore their BATNAs shifted so that a negotiated agreement was unattractive.

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[366] Paragraphs 3 and 4 of ACUS Recommendation 82-4, 47 Fed. Reg. 30,708, 30,709-10 (1982), recommend use of convenors in every regulatory negotiation. Paragraph 10 recommends the use of mediators in some cases.

[367] This experience raised questions about the optional character of ¶ 10 of ACUS Recommendation 82-4. Paragraph 5 of ACUS Recommendation 85-5 urges that mediators be used in virtally all rule negotiations. 50 Fed. Reg. at 52,895 (1985).

[368] Paragraphs (g) and 8 of ACUS Recommendation 82-4, 47 Fed. Reg. 30,708, 30,709-10 (1982), recommend agency participation.

The FAA and EPA were committed to the negotiating process as the primary means of developing a regulation; the OSHA was not. At least some of the difference in agency commitment can be attributed to the lower level of participation by the OSHA. The FAA and its parent agency, the Department of Transportation, and the EPA had key personnel who were enthusiastic about the regulatory negotiation and who had the skills to mediate effectively, supplementing the efforts of the facilitator/mediator; the OSHA and Department of Labor did not. In particular, both the Department of Transportation and the EPA have policy level officials responsible for promoting regulatory negotiation; the Department of Labor did not.[369]

Intraconstituency differences were manifest in both the benzene and flight and duty time negotiations. Both the ATA, representing airlines, and the API, representing petroleum companies, struggled to forge a consensus that could be communicated by their negotiators. The ATA had more success than the API. Notably, the FAA proposed bringing individual company representatives into the negotiations. This may have galvanized the ATA to ensure that it remained an effective participant on behalf of the entire constituency.

In three of the four experiments (benzene, flight and duty time, and NCP) the participants fell short of formal agreement on some of the major issues;[370] indeed one could argue that fewer fundamental matters separated the benzene negotiators when negotiations were adjourned than separated the flight and duty time negotiators. The benzene negotiations, however, are perceived widely as having failed while the flight and duty time negotiations are perceived as having succeeded. The different perceptions, despite the similarity of results, are attributable to the difference in what the agency did when the negotiations were adjourned. The FAA, having participated in the negotiating sessions, had an understanding of what the parties could accept. The OSHA, not having participated, had no such understanding. Communicating the points of agreement on benzene to the OSHA required transmission of a document. The benzene negotiators nevertheless had agreed on a ground rule that no document would be transmitted in the absence of a formal agreement on a total package.[371] No such ground rule restricted the flight and duty time or NCP participants or agencies.

Only the EPA used the "resource pool" concept, which permits supporting travel expenses and possible expert, neutral technical assistance.[372] Participants thought the resource pool was useful and worth utilizing in other negotiatons. On the other hand, as the NCP experience showed, negotiation of a resource pool protocol can be controversial and may get the negotiations off to a bad start.

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[369] When this article was written the author was working with the Office of the Secretary of Labor to develop options for institutionalizing departmental support for negotiated rulemaking and other regulatory improvements.

[370] Paragraph 11 of ACUS Recommendation 82-4, 47 Fed. Reg. 30,708, 30,709-10 (1982), addresses consensus and contemplates the possibility of less than total agreement on all issues.

[371] Establishment of such a ground rule probably was essential for the negotiations to proceed. Paragraph 11 of ACUS Recommendation 82-4, 47 Fed. Reg. 30,708, 30,709-10 (1982), contemplates that negotiators report on less than total agreement, identifying the issues on which they agree and those on which they disagree.

In the three cases in which negotiators reached full or partial agreement, the agencies published the negotiated rule for comment,[373] clearly indicating changes from the negotiated text. In addition, both the FAA and EPA allowed the negotiators to review comments submitted in response to the *Federal Register* notice.[374] This approach satisfied participants.

Compliance with the requirements of the Federal Advisory Committee Act worried everyone. Compliance with the open meeting requirement for meetings of the full negotiating group, however, created few problems in the FAA and EPA negotiations. Agencies including the OSHA generally followed the spirit of paragraph 12 of ACUS Recommendation 82-4, closing sessions only when necessary to protect confidential data and caucuses only when necessary to protect the deliberative process. Some participants and agency personnel believed the open meetings permitted challenges to the negotiating process to be deflected more successfully than if the meetings had been closed.[375] In the benzene negotiations, efforts to avoid the FACA requirements distorted the negotiation process, primarily by foreclosing active agency participation.[376]

No court challenges to the negotiated rules have materialized to date. Thus, there is no experience by which to judge the need for legislation dealing with authority of agencies to use negotiated rulemaking[377] or the need for changes in the standards of judicial review.[378]

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[372] The resource pool concept is a way—without legislation—of implementing ¶ 9 of ACUS Recommendation 82-4, 47 Fed. Reg. 30,708, 30,710 (1982) (certain affected interests may require direct reimbursement to participate and lead to negotiation; Congress should clarify agency authority to provide this reimbursement).

[373] Paragraph 13 of ACUS Recommendation 82-4, 47 Fed. Reg. 30,708, 30,709-10 (1982), recommends such publication.

[374] Paragraph 14 of ACUS Recommendation 82-4, 47 Fed. Reg. 30,708, 30,709-10 (1982), recommends such review.

[375] This information is based on interviews with FAA and DOT personnel involved in the negotiations.

[376] This information is based on interviews with OSHA and Solicitor of Labor personnel.

[377] Paragraph 14 of ACUS Recommendation 82-4, 47 Fed. Reg. 30,708, 30,709-10 (1982), recommends such legislation.

[378] Harter recommended such changes. *See* Harter, *supra* note 7, at 102.

# Administrative Alternative Dispute Resolution: The Development of Negotiated Rulemaking and Other Processes

TABLE OF CONTENTS

I. Introduction .......... 865
II. Historical Developments .......... 867
  A. Emergence of APA from ADR .......... 867
  B. Search For Alternatives .......... 867
  C. The Benzene, FAA, and EPA Experiences with Negotiated Rulemaking .......... 874
  D. Recommendation 85-5 .......... 875
III. The Dynamics of Rule Negotiation .......... 875
  A. BATNA Concept .......... 876
  B. Consensus and Mediation .......... 881
  C. Intra-Constituency Problems .......... 885
IV. Selection of Subjects for Negotiation .......... 889
V. Post Recommendation 85-5 Developments .......... 893
  A. MDA .......... 893
  B. Additional EPA Rule Negotiations .......... 896
  C. Federal Trade Commission Negotiation Initiative .......... 897
VI. Position of Negotiated Rulemaking Under APA .......... 898
  A. Introduction .......... 898
  B. Delegation Doctrine .......... 900
  C. Prohibition of Ultra Vires Agency Action .......... 902
  D. Conflict Between Goals of Informality and Judicial Reviewability .......... 903
  E. Hybrid Rulemaking .......... 904
  F. Ex-Parte Communications .......... 906
  G. Judicial Review Under Arbitrary and Capricious Standard .......... 909
  H. Federal Advisory Committee Act Problems .......... 912
  I. Class Action Settlement Negotiation .......... 913

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J. Representation Issues ........ 915
VII. State Process ........ 918
A. Often Ignored ........ 918
B. Model State APA ........ 918
C. New Jersey, Tennessee, and Minnesota Experiences 919
VIII. Administrative Adjudication ........ 920
A. Precedent ........ 921
B. Legal Issues ........ 924
IX. The Future ........ 928
A. Activities ........ 928
B. Need for Institutionalization ........ 928

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# Administrative Alternative Dispute Resolution: The Development of Negotiated Rulemaking and Other Processes

Henry H. Perritt, Jr.*

## I. INTRODUCTION

Administrative procedure was the original alternative dispute resolution technique. However, the administrative procedures were increasingly institutionalized and had become rigid and cumbersome by the mid-1970's. In the last decade the search for a different approach to formal administrative proceedings has produced promising alternatives. In particular, negotiated rulemaking has gained respect as an alternative to hybrid rulemaking, and many agencies are considering arbitration, fact finding, and mediation rather than formal adjudicatory hearings to resolve certain cases.

Unfortunately, discussions about Alternative Dispute Resolution (ADR) in the legal community have failed to appreciate the enormous flexibility that exists under present law to improve judicial and administrative procedures in traditional forums. Negotiated rulemaking has explored this flexibility, finding it preferable in many ways to the erection of parallel channels for dispute resolution.

Negotiated rulemaking[1] is a process for resolving interest disputes which is similar in many ways to the legislative process. It emerged as a distinct administrative law concept in the late 1970's because notice-and-comment and hybrid rulemaking[2] processes were inappropriate for making quasi-legislative, administrative agency decisions. Sanctioned by the Administrative Conference of the United States[3] (ACUS) as a worthy alternative to hybrid rulemaking, negotiated rulemaking has been used successfully by four different agencies and warrants even wider use.

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[1] Negotiated rulemaking is a specific application of regulatory negotiation. It refers to the use of negotiation in the decision-making process associated with rulemaking. Regulatory negotiation refers to the use of negotiation in any decision-making process by an administrative agency.

In fact, negotiated rulemaking is the only one of several alternative dispute resolution techniques that can be used by administrative agencies. It is designed to facilitate resolution of "interest disputes" whereas other techniques, such as arbitration, fact finding, and mediation are more suited to "rights disputes." Each of these rights disputes resolution techniques has been used or considered to some degree.[4]

This article reviews the negotiated rulemaking concept in the context of the ACUS recommendations and agency experience, and considers recent efforts to simplify the handling of individual cases. It also builds on the author's report to the ACUS on four completed rule negotiations[5] which led ACUS to adopt Recommendation 85-5 in late 1985.

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[2] Terminology is a problem in comparing negotiated rulemaking to more traditional processes. This article uses the term *adjudication* to refer to an adversarial decision-making process in which the parties present their cases to the agency by examining witnesses and introducing qualifying documents somewhat in accordance with formal rules of evidence. *Hybrid rulemaking* is a procedure imposed by statute or the judiciary under the Administrative Procedure Act [hereinafter APA] in which adjudicatory procedures are used to some degree in the rulemaking process, though the type of decision-making involved would be termed "rulemaking" and not "adjudication" as those terms are defined by the APA. Hybrid rulemaking is discussed more fully in Section VI of this article.

[3] The Administrative Conference of the United States [hereinafter ACUS] was established to improve administrative procedures within federal agencies. Administrative Conference Act, Pub. L. No. 88-499, 78 Stat. 615 (1964). The President appoints a full-time chairman to the ACUS for a five-year term and he is the only person entitled to compensation for his services. The Council, which is the executive board, consists of the chairman and 10 other members appointed by the President for three-year terms. Only half of those 10 members may be drawn from federal agencies. The total membership of the ACUS may not exceed 91 members nor be fewer than 75 members. In addition to the Council, the membership is comprised of 44 government members (heads of agencies or their designees) from 36 agencies and approximately 36 nongovernmental members appointed by the chairman, with Council's approval, for two-year terms. The Council must call at least one plenary session during each year. The membership meeting in plenary session is known as the Assembly of the Administrative Conference. Administrative Conference Act, 5 U.S.C. §§ 571-576 (1983).

[4] Section VIII of this article explores recent ACUS recommendations covering ADR techniques for rights disputes.

[5] H. Perritt, Analysis of Four Negotiated Rulemaking Efforts (Nov. 15, 1985) (available from the ACUS). An edited version of the report appears in Perritt, *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 GEO. L.J. 1625 (1986) [hereinafter *Evaluation of Recommendations*]. Abbreviated summaries of the report appeared in Perritt, *Negotiated Rulemaking in Practice*, 5 J. POL'Y ANALYSIS & MGMT. 482 (1986),

## II. Historical Developments

### A. *Emergence of APA From ADR*

The Administrative Procedure Act[6] (APA) emerged from a debate over whether administrative procedure should be institutionalized according to a judicial model.[7] President Roosevelt vetoed an initial version of the APA in 1939 because it sought to force administrative procedures into an adversarial decision-making mode.[8] The Act, as finally passed, recognized a considerable variety of procedures employed by different agencies.[9] The modern search for ADR techniques is largely consistent with the earlier recognition that diversity among procedural techniques is as appropriate in administrative procedure as it is in judicial procedure, depending on the nature of the dispute to be resolved.

### B. *Search For Alternatives*

New administrative processes originated from the increased use of administrative litigation to address problems previously dealt with in markets, through private contractual negotiation,[10] or by elected representatives in legislative assemblies. The use of administrative regulations to deal with these problems stemmed from a combination of increased government intervention to deal with market imperfections[11] and the impracticability of legislative assemblies taking on the resultant burden of decision-making themselves.

While administrative processes evolved toward more adversarial judicially based models, negotiation was already deeply rooted as a means of setting policy. When rules for societal conduct are made in private markets or in representative assemblies, the process of negotiation is relied upon.[12] Negotiation occurs as part of the legislative

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and Perritt, *Negotiated Rulemaking and Administrative Law*, 38 ADMIN. L. REV. 471 (1986).

[6] 5 U.S.C. §§ 551-559, 701-706 (1982).

[7] *See generally Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 511 (1986).

[8] *Id.* at 512.

[9] *Id.* at 515.

[10] *See* L. FULLER, THE PRINCIPLES OF SOCIAL ORDER 172-187 (1981) (contrasting private negotiation with governmental decision-making).

[11] *See* S. BREYER, REGULATIONS AND ITS REFORM 15-35 (1982); J. DUNLOP, DISPUTE RESOLUTION: NEGOTIATION AND CONSENSUS BUILDING 4 (1984).

[12] *See* J. DUNLOP, DISPUTE RESOLUTION: NEGOTIATION AND CONSENSUS BUILDING

procedure in a representative assembly at two levels: first, as a part of the process through which representatives are elected; and second, as part of the interaction among the representatives making the compromises necessary to pass a statute. At both levels, no single interest or constituency can get everything it wants; each must set priorities for its demands, and trade off one against the other.[13] There is an incentive to find common ground, either to form a majority to elect a favored candidate or to form a majority to pass desired legislation.

The shift in rulemaking responsibility from markets and legislatures to administrative agencies made negotiation more difficult. Essentially, agencies make rules because the legislature has left certain issues among conflicting interests unresolved. In exercising the rulemaking responsibility delegated by the legislature, however, agencies lack many of the institutional attributes that facilitate accommodation among conflicting interests. In particular, accommodation and compromise, which result from the election of representatives are absent[14] and thus agencies must deal with a broad range of atomistic interests[15] rather than benefiting from the aggregation of interests that occurs in election politics. Additionally, there is no assurance that even a multi-member agency represents the major conflicting interests on any issue before it. Thus, the framework for the second stage of accommodation, which is typical of a legislative institution, may also be lacking.

Since an administrative agency lacks the institutional attributes which make private accommodation an integral part of the legislative process, it must find other ways to strike a balance between competing views in developing a rule which will be acceptable to those affected by it.[16]

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1-22 (1984) (describing and comparing private and political negotiation); J. HURST, DEALING WITH STATUTES 19 (1982) (stating that legislature is basically an arena for bargaining); V.O. KEY, POLITICS, PARTIES AND PRESSURE GROUPS 7 (1942) (politics is a struggle among groups or interests); Dunlop, *The Negotiations Alternative in Dispute Resolution*, 29 VILL. L. REV. 1421 (1984) (describing negotiations process).

[13] *See generally* Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1188 (1973) (describing the pervasiveness of political compromise in the context of administrative regulation).

[14] Of course, some degree of accommodation occurs in connection with the appointment of administrative agency policy personnel and in legislative oversight of agency functioning. Nevertheless, agencies are only indirectly accountable to the public and are subject to political forces only when the press or the public takes an interest in an issue before an agency, or through occasional intervention by the legislature or the executive.

[15] The breadth of the interests with which an agency must deal is a function of the type of program for which an agency is responsible.

[16] In addition, the agency is obligated by law to pursue statutory objectives regardless of what affected interests think. Agencies can only search for accommodation consistent with their statutory mandates.

Administrative law has searched in recent years for ways to reconcile conflicting interests.[17] The original administrative law models emphasized judicial review to keep agencies within statutory bounds, and decisional procedures were designed to promote the accuracy, rationality, and reviewability of agency decisions.[18] Yet administrative procedures modeled on judicial processes do not fit the needs of administrative rulemaking. Administrative law has struggled to provide a surrogate political process to ensure the fair representation of a wide range of affected interests in the administrative decision-making process.[19] Until the mid-1970's, however, procedures continued to be modeled on judicial trials despite the fact that they were ill suited for a "surrogate political process."[20]

A major cause of the discrepancy between administrative procedure and the decision-making requirements of delegated legislative power was the failure to distinguish "rights disputes" from "interest disputes."[21] Adjudication is designed to deal exclusively with rights disputes,[22] which are concerned with the application of pre-existing legal standards or "rules of decision" to facts determined by the adjudicator. Interest disputes, on the other hand, are characterized by the absence of pre-existing rules of decision. The resolution of interest disputes requires the conflicting parties to work out the rules in a way that accommodates their interests. Although the political process and private contractual negotiation are well suited to resolving interest disputes, the adjudicatory process is not.[23] Nevertheless, adjudicatory procedures were superimposed on the rulemaking process.[24] As agencies were delegated more responsibility for legislating, the need for a process equipped to deal with interest disputes became more apparent.[25]

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[17] Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

[18] *Id.* at 1670.

[19] *Id.* at 1670. *See also* Jaffe, *supra* note 13, at 1184, 1188 (criticizing model based on the assumption that Congress establishes an objective that "is capable of disinterested and nonpolitical administration," and suggesting instead a political model).

[20] Stewart, *supra* note 17, at 1670.

[21] *See* Perritt, *And the Whole Earth Was of One Language: A Broad View of Dispute Resolution*, 29 VILL. L. REV. 1221-29 (1984).

[22] *See* Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 369 (1979).

[23] *See id.* at 368.

[24] See *infra* section VI, subsection E of this article regarding hybrid rulemaking. The point is not that APA "adjudication," under sections 556 and 557 is used in rulemaking, but rather that certain trial type procedures associated with adjudication have been superimposed on information rulemaking conducted under APA section 553.

The development of new administrative processes accelerated in the 1970's. Harvard law professor Richard B. Stewart, writing in 1975, considered some of the alternative procedures available to agencies given responsibility for a surrogate political process.[26] He concluded that all of the obvious possibilities for application within traditional procedural frameworks were seriously flawed.[27] This prompted Stewart to explore more "explicitly political" mechanisms for interest representation.[28]

At the time Stewart was writing, some forms of administrative negotiations were well established, though not very visible.[29] It was a relatively common practice for parties who challenged a regulation to negotiate an acceptable agreement.[30] Rather than litigate a rule's validity in the courts, a complainant would withdraw the complaint challenging the rule in return for the promulgating agency's agreement to modify the existing rule. This is exemplified in *Environmental Defense Fund, Inc. v. Costle*.[31] In this case, several environmental groups[32] brought four separate lawsuits against the Environmental

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[25] *See* Harter, *Dispute Resolution and Administrative Law: The History, Needs, and Future of a Complex Relationship*, 29 VILL. L. REV. 1393 (1984).

[26] Stewart, *supra* note 17, at 1760-89.

[27] *Id.* Stewart observed that agencies themselves are likely to afford certain interests disproportionate influence, and that the courts are ill suited to force an alteration in the balance of interests. *Id.* at 1789-90.

[28] *Id.* at 1790.

[29] Harter found examples of such alternatives in the Consumer Product Safety Commission "offeror process," the National Institute of Building Sciences, innovations by Secretary Dunlop, ad hoc efforts involving dam building and uranium mine siting controversies, sequential negotiations frequently involved in formulating Notices of Proposed Rulemaking, occupational safety and health consensus standards developed by private groups, the National Coal Policy Project, site-specific environmental negotiation, and negotiated settlements of lawsuits challenging Environmental Protection Agency [hereinafter EPA] regulatory decisions. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 25-42 (1982). He might also have noted negotiations within "rate bureaus" under the Interstate Commerce Act, and the Federal Railroad Administration's experience with air brake regulations. In 1982, the Federal Railroad Administration amended rules pertaining to railroad air brakes. The resulting changes stemmed from a Notice of Proposed Rulemaking [hereinafter NPRM] adopted at the joint request of the Association of American Railroads, the main industry trade association, and the Railway Labor Executives Association, a confederation of labor organizations representing rail employees. 49 C.F.R. § 232 (1986). Comments submitted in response to the NPRM were generally supportive, and resulted in a final rule reflecting the labor-industry agreement. *Id.*

[30] Harter, *supra* note 29, at 36. Harter further points out that the settlement of agency disputes is specifically provided for in the Administrative Procedure Act. *Id.* at 36 n.195 (citing 5 U.S.C. § 554(c) (1976)). Moreover, in approving agency negotiations, the legislative history of the APA pointed to the courts' use of pre-trial proceedings to dispose of much of their business. *Id.*

[31] 636 F.2d 1229 (D.C. Cir. 1980).

[32] These groups collectively form the Natural Resources Defense Council [hereinafter NRDC]. The groups are the Natural Resources Defense Council, Inc., Environmental Defense Fund, Inc., National Audubon Society, Inc., Citizens for a Better

Protection Agency (EPA), challenging its alleged failure to implement provisions of the Federal Water Pollution Control Act relating to toxic pollutants.[33] While these suits were pending, the EPA and Natural Resources Defense Council (NRDC) began settlement negotiations and later submitted a proposed settlement agreement to the district court. Four industrial companies intervened in the proceeding and vigorously opposed the proposed agreement; nonetheless, the district court approved the settlement agreement.[34] Subsequently, these same companies filed a motion to vacate the agreement and a proposed modification[35] to that agreement. Both the district court[36] and the Court of Appeals for the District of Columbia Circuit denied the companies' motions.[37] The *Costle* district court could have given the companies greater opportunity to negotiate with the EPA and NRDC about the strategy to be used in regulating toxic pollutants. However, instead of involving the companies in the initial settlement negotiations, the court simply heard opposing arguments to the agreement which had been worked out between the EPA and NRDC.[38]

At about the time that Stewart's article appeared, the policy currents were primarily influenced by John T. Dunlop,[39] who regarded

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Environment, Inc., and Business and Professional People for the Public Interest, Inc. *Id.* at 1233 n.4, 1234.

[33] Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1980) [hereinafter FWPCA]. The first suit challenged the criterion that the EPA was using to determine which pollutants were toxic. The second and third suits were to compel the EPA to promulgate effluent standards for substances presently on the Agency's list of toxic pollutants. The fourth suit sought to compel the EPA to promulgate pretreatment standards for various pollutants. *Costle*, 636 F.2d at 1234.

[34] *Costle*, 636 F.2d at 1235 (citing Natural Resources Defense Council v. Train, 8 Env't Rep. Cos. (BNA) 2120, 2122 (D.D.C. 1976)). The agreement was signed by the EPA, the five environmental groups and the National Coal Association and was incorporated in a consent decree signed by the district court. The settlement agreement outlined a strategy for regulating toxic pollutant discharges under the FWPCA. The agreement included details about timing, scope, and nature of the regulatory programs that the EPA agreed to initiate. *Id.*

[35] *Id.* at 1237. This modification agreement was made after the NRDC complained that the EPA was not observing the initial settlement agreement. While the NRDC later withdrew its order to show cause against the EPA, the companies still sought to challenge both settlement agreements. The district court denied both of the companies' motions. *Id.*

[36] *Id.*

[37] *Id.* at 1259. The court remanded the case for a determination of whether it was appropriate for the EPA to enter into an agreement that might infringe upon the discretion that Congress had committed to the administrator. *Id.*

[38] *Id.* at 1235.

[39] Mr. Dunlop was Secretary of Labor from 1974-75, and before that, head of the Nixon wage-and-price-controls program. Mr. Dunlop had a distinguished background

negotiation as an alternative to adjudicatory litigation in making administrative rules. While Dunlop was Secretary of Labor he authored a paper, "The Limits of Legal Compulsion," which he distributed to the President, White House staff personnel concerned with developing regulatory reform ideas, and Labor Department policy officials. The paper was ultimately published in several journals.[40]

The paper began with an invitation to compare "essentially private methods for rule-making within a broad and general governmental context—exemplified by collective bargaining—and the more intensive approach of governmental promulgation of mandatory regulations."[41] After identifying eleven problems with the existing approach to regulation, the study went on to suggest that "the parties who will be affected by a set of regulations should be involved to a greater extent in developing those regulations."[42]

During his tenure as Secretary, Dunlop also sought to promote greater consideration of the negotiation alternative in the academic community. He directed the author of this article[43] to establish liaison with professors of law and political science and with former government policy makers who might have an interest in the concept. At one point, Dunlop invited Professor Stewart, Professor James Q. Wilson, William Ruckelshaus, past and future Administrator of EPA, and a number of others to discuss alternatives to traditional rulemaking in an informal seminar. During this period, Philip J. Harter was detailed from the staff of the ACUS to the Council of Economic Advisers to work with Joseph L. Kirk, Director of Policy Analysis for the Occupational Safety and Health Administration (OSHA), to examine alternatives to traditional administrative processes.[44]

After Dunlop resigned as Secretary of Labor in February, 1976, his successor, W.J. Usery, Jr., encouraged the author and Under Secre-

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as a professor of economics and dean of the faculty of arts and sciences at Harvard, labor mediator, and advisor of presidents on national labor-management policy. As much as anyone in the United States at the time, he was the expert on the process of negotiation as a means of resolving workplace disputes.

[40] *See* Dunlop, *The Limits of Legal Compulsion*, 27 LAB. L.J. 67 (1976).

[41] *Id.* The paper offered, by way of example, the method used by Dunlop to implement section 13(c) of the Urban Mass Transportation Act, which precluded distribution of certain mass transit subsidy funds until the Secretary of Labor certified that employees would not be adversely affected by the federally funded activities. Mr. Dunlop also sought to mediate an agreement between the United Steelworkers and the Steel Industry on a health standard for coke oven emissions. This effort to negotiate a rule is discussed more fully in Section V of this article.

[42] *Id.*

[43] During the period of time discussed in the text, the author of this article was Deputy Under Secretary of Labor, responsible for assisting Dunlop with regulatory reform matters.

[44] Memorandum from Paul W. MacAvoy to Executive Committee, Economic Policy Board (May 18, 1976).

tary Michael Moskow to continue the regulatory reform effort. With Usery's support, the Department sponsored doctoral research by Lawrence Bacow, which resulted in the publication of a study of how safety and health standards had been addressed through collective bargaining in the automobile and other industries.[45] Bacow went on to play a central role in the drafting and implementation of the Massachusetts Hazardous Waste Facility Siting Act,[46] which provides a statutory framework for negotiations between local communities and developers of waste disposal sites in that state.

The Department of Labor also provided seed money for an interdisciplinary effort at Harvard University, which ultimately developed into the Harvard Negotiation Project. The first executive director of the Harvard effort was William Drayton, who was Associate Administrator of EPA during the Carter Administration. Minow, an EPA attorney who worked with Drayton, subsequently helped Harter formulate the ACUS negotiated rulemaking recommendations.

Thus, the seeds were planted at the ACUS, Department of Labor, and EPA for the negotiated rulemaking idea. Bacow, Drayton, Harter, Ruckelshaus, and Stewart all played major roles in refining the negotiation concept.

Dunlop's idea of using negotiation as a regulatory procedure responded to Stewart's exploration of explicitly political processes. It was another means of permitting political bargaining that was not openly considered in Stewart's article. Yet, the negotiation idea presented difficulties, especially with respect to the representation process.

These difficulties were addressed by Harter, under ACUS sponsorship, after his experience in examining OSHA as part of the Economic Policy Board task force. Harter wrote a law review article[47] in which he carried the Dunlop concept further. He sought to develop criteria for generalizing the use of "explicitly political" processes[48] to improve administrative agency decision-making.

Harter, contemporaneously with writing his article, also drafted what became ACUS Recommendation 82-4, which concluded:

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[45] L. BACOW, NEGOTIATING HEALTH AND SAFETY (1976). Mr. Bacow is now on the faculty of the Massachusetts Institute of Technology.

[46] MASS. GEN. LAWS ANN. ch. 21D, §§ 12-15 (West 1981). *See* Bacow & Milkey, *Overcoming Local Opposition to Hazardous Waste Facilities: The Massachusetts Approach*, 6 HARV. ENVTL. L. REV. 265 (1982).

[47] Harter, *supra* note 29, at 1. *See also* S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 592-607 (2d ed. 1985).

[48] Harter, *supra* note 29, at 42-61.

> Agencies should consider using regulatory negotiation, as described in this recommendation, as a means of drafting for agency consideration the text of a proposed regulation. A proposal to establish a regulatory negotiating group could be made either by the agency (for example, in an advance notice of proposed rulemaking) or by the suggestion of any interested person.[49]

### *C. The Benzene, FAA, and EPA Experiences With Negotiated Rulemaking*

In the three years following adoption of ACUS Recommendation 82-4, negotiated rulemaking was utilized four times by federal agencies. The following table summarizes the four negotiations.

TABLE 1 - FOUR RULEMAKING NEGOTIATIONS

| Agency | Subject | Dates | Outcome | Status |
|---|---|---|---|---|
| OSHA | Benzene Health Std. | 1983-1984 | Adjourned | Final Rule Out[50] |
| FAA | Flight & Duty Time | 1983-1985 | Consensus | Final Rule Out[51] |
| EPA | Non-Confor. Penalties | 1984-1985 | Consensus | Final Rule Out[52] |
| EPA | Pesticide Exemptions | 1984-1985 | Consensus | Final Rule Out[53] |

The Federal Aviation Administration (FAA) used negotiated rulemaking to develop a new flight-and-duty-time regulation for airline flight crews.[54] The EPA used negotiated rulemaking to develop proposed rules on nonconformance penalties for vehicle emissions, and on emergency exemptions from pesticide regulations.[55] OSHA encouraged labor, public interest, and industry representatives to negotiate a standard for occupational exposure to benzene.[56] Unfortunately, the benzene negotiations did not produce a consensus among the parties on a proposed rule, but the other three negotiations did result in at least partial agreement, and in proposed rules based on the negotiations. Three of the rules have been promulgated in final form, and none has been challenged.

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[49] 1 C.F.R. § 305.82-4 ¶¶ 4(g), 8 (1986).

[50] On December 10, 1984, the steelworkers filed a petition for a writ of mandamus in the United States Court of Appeals for the District of Columbia Circuit, seeking to require the Occupational Safety and Health Administration [hereinafter OSHA] to issue an NPRM for a benzene standard within 30 days of the court's decision, and to issue a permanent standard within seven months of the NPRM. OSHA issued its NPRM just before oral argument. United Steelworkers of America v. Rubber Mfrs. Ass'n, 783 F.2d 1117, 1119 (D.C. Cir. 1986). After oral argument, the court ordered OSHA to submit a timetable for post-NPRM activities. The timetable submitted required OSHA to complete its staff analysis by November 10, 1986, and to issue a final standard by February 10, 1986. The court denied the petition for faster action on the proposed rule and declined to retain jurisdiction on February 25, 1986. *Id.* at 1120. A final rule was issued on September 11, 1987. 52 Fed. Reg. 34,460 (1987) (to be codified at 29 C.F.R. § 1910).

[51] 50 Fed. Reg. 29,306 (1985) (to be codified at 14 C.F.R. §§ 121, 135).

[52] 50 Fed. Reg. 36,732 (1985) (to be codified at 40 C.F.R. § 66).

[53] The final rule was published on January 15, 1986. 51 Fed. Reg. 1896 (1986). Comments on the proposed rule were received from 19 sources. In its preamble to the final rule, the EPA discussed these comments, referring to the negotiations with respect to two of the comments, but otherwise offering its own rationale in support of the rule.

[54] For details of the Federal Aviation Administration [hereinafter FAA] negotiation, *see Evaluation of Recommendations*, *supra* note 5, at 1667-74.

Other agencies have shown an interest in the negotiated rulemaking process, and other major efforts are underway.[57] In order to provide guidelines for use of the new process, the ACUS published an additional set of recommendations in December, 1985,[58] as proposed by the author of this article.

The 1982 ACUS recommendations address the role of negotiated rulemaking within the legal framework of the APA and judicially developed administrative law concepts. In contrast, the 1985 recommendations address the dynamics of the negotiation process in the rulemaking setting. Together, the two ACUS recommendations present a framework for planning a rule negotiation.

### *D. Recommendation 85-5*

The report accompanying ACUS Recommendation 85-5 concluded that negotiated rulemaking is a practical alternative to notice-and-comment or hybrid rulemaking, and that Recommendation 82-4 was basically sound. Assuming negotiations are permitted by the APA,[59] Recommendation 85-5 offers guidance on how agencies and private participants can increase their chances of reaching a consensus.

## III. THE DYNAMICS OF RULE NEGOTIATION

As Recommendation 85-5 recognized, the utility of negotiated rulemaking should be evaluated by reference to the dynamics of the negotiating process in the administrative regulatory setting. This section considers those dynamics, explaining how they justify particular ACUS recommendations.

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[55] For details of the EPA negotiations, *see id.* at 1674-82.

[56] For details on the benzene negotiation, *see id.* at 1647-67.

[57] *See infra* Section V of this article.

[58] ACUS Recommendation 85-5, 1 C.F.R. § 305.85-5 (1986).

[59] *See infra* Section VI of this article.

### *A. BATNA Concept*

Notwithstanding efforts to impose adjudicatory procedures for the formulation of regulatory policy, regulatory program decisions are made in a political environment.[60] They provide a mechanism within which political accommodation can occur, but it can work only if people who are able to use other processes have an incentive to participate in negotiations and to reach an agreement. The best way to understand incentives to negotiate is to consider negotiations between two hypothetical, monolithic parties.[61] Having identified the incentives for these hypothetical parties, one can then overlay complications resulting from intra-constituency disagreements.

A useful conceptual structure for understanding incentives to negotiate was suggested by Professors Fisher and Ury in their popular book on the negotiation process.[62] They explain that the participation of any party to a negotiation will be guided by that party's "Best Alternative to Negotiated Agreement" (BATNA). A participant in negotiations will not concede to an outcome worse than its BATNA. If a party thinks that its BATNA is superior to anything that can be obtained in negotiation, the party will simply not negotiate.

The following examples may be helpful. If I am considering buying a car from you, and know that I can get the identical car from your competitor across the street for $10,000, I will negotiate with you only if I think our negotiations may result in an agreement for less than $10,000. The $10,000 is my BATNA. Or, if I am a plaintiff in a personal injury lawsuit, and the expected net value[63] of a jury verdict to me is $25,000, I will negotiate a settlement with you, the defendant, only if the settlement is worth more to me than $25,000. My BATNA in these negotiations is $25,000.[64]

For potential participants in a regulatory negotiation, BATNA's are determined by perceptions of what the agency will do in the absence of a negotiation.[65] A rational, monolithic party will participate in regulatory negotiation only if it anticipates that the negotiated outcome will be superior to its BATNA, as determined by its estimate of probable unilateral agency action.[66] Since each party is likely to evaluate the unilateral agency outcome differently, or to measure the impact of agency action against different cost or utility functions, BATNA's will tend to vary appreciably.

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[60] *See generally* Jaffe, *supra* note 13, at 1188 (describing the pervasiveness of political compromise in the context of administrative regulation).

[61] Negotiation between monolithic parties is addressed in this section. Complications introduced by intra-constituency disagreements are addressed in Section III, subsection C of this article.

[62] R. FISHER & W. URY, GETTING TO YES (1981).

[63] Litigation expenses, including the cost of possible appeals, must be subtracted from the gross amount of the expected verdict, and the time-value of money must be taken into account through an appropriate "discount rate."

[64] *See* Perritt, *supra* note 21, at 1247-51.

[65] What the agency will do is affected by what courts and the legislature will do, so perceptions of these influences are important also.

The BATNA-determined participation incentive is also dynamic: it will change over time for each party as it gets additional information about the agency's intentions. More importantly, other negotiators, neutral mediators or conveners, and the agency itself, can influence party BATNA's, and hence party incentives to negotiate.

The most appropriate analogy to a regulatory negotiation is not a traditional labor-management negotiation where BATNA's are determined by each party's assessment of the opponent's ability to inflict injury or to offer rewards. Rather, the best analogy is to settlement negotiations in civil litigation where party predictions of the probable behavior of a nonparty, the judge or jury, determine BATNA's. In regulatory negotiations, as in settlement negotiations, the third party decision-maker can influence party perception of the likely outcome in the absence of a negotiated settlement. In other words, the agency or judge changes BATNA's by what it says about its intentions.

This model suggests that regulatory negotiations are most likely to be successful when the agency (or some other credible source) persuades each potential participant that unilateral agency action has undesirable consequences for the potential participant. Less attractive BATNA's result in greater incentives to negotiate a solution.

This part of the analysis suggests the first hypothesis for effective regulatory negotiation: parties will negotiate only if they perceive the outcome of unilateral agency action to be worse than what is attainable in the negotiation.[67] The hypothesis has two corollaries: (1) regulatory negotiations are more likely to be successful if the parties agree on what the outcome will be in the absence of negotiations, or, if they disagree, if they are all pessimistic rather than optimistic; (2) regulatory negotiations are more likely to be successful if the agency actively influences party perceptions of BATNA's, emphasizing the undesirable consequences of unilateral agency action in terms relevant to each party.

The first four agency experiences with negotiated rulemaking illustrated the validity of these hypotheses. BATNA's in the OSHA benzene negotiations were relatively attractive, reducing incentives t negotiate.[68] The OSHA litigation had exaggerated points of disagreement, and led to divergent perceptions of what OSHA was expecte to do in response to the Supreme Court's decision. Labor expecte OSHA action similar to the rule invalidated by the Supreme Court Industry expected such a standard could be blocked in litigation or i the Office of Management and Budget (OMB) clearance process Thus, each side perceived a relatively favorable BATNA, reducing the incentives to negotiate.

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[66] The process was explored by my former student, Robert L. Sachs, Jr. *See* Comment, *An Alternative to the Traditional Rulemaking Process: A Case Study of Negotiation in the Development of Regulations*, 29 VILL. L. REV. 1505 (1984).

[67] This is the thrust of Recommendation Number 2 from ACUS Recommendation 85-5, 1 C.F.R. § 305.85-5 ¶ 2 (1986).

Compared to BATNA's in the OSHA negotiation, BATNA's in the FAA negotiation were relatively unattractive.[69] The FAA's unsuccessful attempts at flight-and-duty-time rulemaking had convinced the participants that unilateral FAA action, within a fairly wide ambit of legal permissibility, could be harmful to their interests.

The need for favorable BATNA's was the motivation behind paragraphs one and two of ACUS Recommendation 85-5.

> 1. An agency sponsoring a negotiated rulemaking proceeding should take part in the negotiations . . . .
>
> 2. Negotiations are unlikely to succeed unless all participants (including the agency) are motivated throughout the process by the view that a negotiated agreement will provide a better alternative than a rule developed under traditional processes. The agency, accordingly, should be sensitive to each participant's need to have a reasonably clear expectation of the consequences of not reaching a consensus. Agencies must be mindful, from the beginning to the end of negotiations, of the impact that agency conduct and statements have on party expectations. The agency, and others involved in the negotiations, may need to communicate with other participants—perhaps with the assistance of a mediator or facilitator—to ensure that each one has realistic expectations about the outcome of agency action in the absence of a negotiated agreement. Communications of this character always should consist of an honest expression of agency actions that are realistically possible.[70]

Paragraph one derives from the principle articulated in paragraph two. Paragraph two stresses that agencies should understand the major influence they exert on party expectations and, therefore, on party BATNA's.[71] This is the major lesson learned from the unsuccessful benzene negotiations. The utility of participation for a party is measured in terms of the likelihood of a negotiated settlement that is equal to or better than each party's BATNA. Hence, in the same way as a judge seeks to induce private litigants to settle a lawsuit, the agency, as decision-maker, must point out the flaws in each party's argument and position, and ensure that each party understands why the outcome of agency action, in the absence of negotiated agreement, may not be as favorable as the party anticipates.

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[68] For details on the benzene negotiation, *see Evaluation of Recommendations, supra* note 5, at 1647-67.

[69] For details on the FAA negotiation, *see id.*, *supra* note 5, at 1667-74.

[70] 1 C.F.R. § 305.85-5 ¶¶ 1, 2 (1986).

[71] The Best Alternative to Negotiated Agreement [hereinafter BATNA] concept is explained *supra*, at text accompanying note 62.

Agency participation in negotiations, addressed in Recommendation Number one, promotes realistic party expectations. The agencies should also be willing to prepare and distribute draft rules or outlines, and instead of fearing premature disclosure of tentative staff views, they should actually welcome such disclosure because it portends what an agency might do in the absence of a negotiated rule. These drafts could even serve as a useful framework or agenda for negotiations.[72]

Of course, much of this conditioning of party expectation can be done by the facilitators, but the facilitators' representations will not be credible for long unless the agency acts to reinforce the representations. Agency participation occurs in various ways, ranging from full participation as a negotiator to acting as an observer and commenting on possible agency reactions and concerns. Agency representatives participating in negotiations should be sufficiently senior in rank to be able to express agency views with credibility.

This recommendation states that agencies should use negotiations as the primary channel for communicating with the parties. This is another major lesson learned from the unsuccessful effort to negotiate a benzene health standard. The utility of negotiating is an inverse function of group influence outside the negotiations, by direct dealings with the agency, by contact with OMB, by litigating in the courts, and by lobbying with the Congress.

The willingness of a group to participate meaningfully in negotiated rulemaking is affected by how it perceives its ability to influence the content of the rule through other channels. A group that has a low estimate of its leverage with the agency may embrace negotiations as a way of participating equally with other interests and as an improvement over what it believes its influence would be in more traditional notice-and-comment rulemaking. Conversely, a group that believes it can effectively influence the agency may fear negotiation will reduce its impact and thus may be more reluctant to participate meaningfully. Similarly, a group that has been successful in judicial challenges to agency decisions is more likely to prefer the litigation alternative to negotiations. A group perceiving itself with substantial influence at OMB or in Congress is less likely to be enthusiastic about negotiating. Of course, the willingness to negotiate is not dichotomous: the factors that make a group less willing to participate may permit it to participate, but not to be willing to make many changes in its position.

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[72] Such conditioning of party expectations by the agency is delicate; it can reinforce party fears that the agency will not participate in the negotiations in good faith, or it can chill meaningful party contributions by signaling that the agency has already reached a decision.

Participation by the agency—and by OMB—reduces the real or perceived potential for parties to undermine the negotiating process by making "end runs" to the agency or to OMB.[73] Agency participation also affords an opportunity for greater access to the agency than some parties might expect in hybrid rulemaking. Participation also increases the likelihood that the agency and OMB will support, and understand the basis of, negotiated recommendations. Furthermore, an agency's involvement broadens the range of options available regarding consensus.[74] The same logic might militate in favor of congressional staff participation in some negotiations. If, for some reason, agency or OMB participation is not acceptable, the facilitator/mediator should serve as a channel between the negotiations and OMB and congressional staff.

The most striking difference between the benzene negotiations and the other negotiations is that OSHA did not participate in the benzene negotiations, whereas agencies did participate in the others.[75] Agency participation prevented harmful divergences in expectations about what the agency would do unilaterally, and therefore conditioned BATNA's so as to maintain incentives for negotiated agreement. In the benzene negotiation, the participants came to believe they would do better outside the negotiations, working directly with OSHA or with OMB, and their BATNA's shifted accordingly, rendering negotiated agreement unattractive.

The FAA and EPA were committed to the negotiating process as the primary means of developing a regulation; OSHA was not. At least some of the difference in agency commitment can be attributed to the lower level of participation by OSHA. The FAA, its parent agency, the Department of Transport (DOT), and the EPA had key personnel who were enthusiastic about regulatory negotiation and who had the skills to mediate effectively, supplementing the mediation efforts of the facilitator/mediator; OSHA and the Department of Labor (DOL) did not. In particular, both DOT and EPA had policy level officials responsible for promoting regulatory negotiation; DOL did not.

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[73] Some agencies and commentators question the appropriateness of the Office of Management and Budget [hereinafter OMB] participation, arguing that it is the agency's responsibility to obtain OMB concurrence in any proposed regulation. The whole point of negotiations, however, is to get *all* interests likely to influence the substance of a regulation to communicate directly with each other. Under Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981), *reprinted in* 5 U.S.C.A. § 601 (West 1985 & Supp. 1986), OMB has a major role to play. The cotton dust experience, described in Section V of this article, demonstrates the risk of negotiating a consensus without taking OMB's views into account. Evidence from the benzene negotiations suggests that Industry's position was significantly determined by what it thought OMB would do with a unilateral OSHA proposal. Such perceptions should be tested and taken into account in the negotiations themselves. At a minimum, agencies considering negotiated rulemaking in a particular proceeding should have a clear strategy for obtaining OMB support and for involving OMB as negotiations proceed. This may be accomplished using facilitator/mediators as intermediaries.

[74] Consensus is discussed in Section III, subsection B of this article.

[75] Paragraphs 4(g) and 8 of ACUS Recommendation 82-4, C.F.R. § 305.82-4 ¶¶ 4(g), 8 (1986), recommends agency participation.

There are, of course, various forms of agency participation. Harter recognized implicitly two forms of negotiated rulemaking, one in which the agency participates in the negotiations ("Agency Participation Model") and another in which it does not ("Agency Oversight Model").[76] The same two variants had been addressed more explicitly in a Harvard Law Review note published around the same time.[77] Recommendation 85-5 does not contemplate that the "agency oversight" model would never be useful. The parties might be motivated so strongly to negotiate a resolution of their disagreements that agency participation would actually be unnecessary.[78]

In most cases, the agency should be represented on the committee and should ask questions and try to gain information from participants in order to gain substantive knowledge and to probe the weaknesses in a party's position. Experience suggests, however, that the agency should avoid directing the participants toward one result or another since that kind of participation can stifle debate. There is a fine line between an agency's showing its hand too early and offering a proposal to stimulate movement in the negotiations and remind participants what the prospects of deadlock may be.

### *B. Consensus and Mediation*

The objective of negotiated rulemaking is to reach "consensus" among the participants as to the content of the proposed rule. Harter characterized the definition of consensus as "one of the most difficult and complex questions in regulatory negotiation."[79] He concluded that experience was necessary before anyone could develop more concrete ideas on what consensus should entail, pointing out, however, that the existence of a consensus is more a matter of feel, than of mathematical calculation.[80] The Harter formulation necessarily omitted detailed formulation of the conditions conducive to closure on an agreement.[81]

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[76] Harter, *supra* note 29, at 57-58.

[77] *See* Note, *Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking*, 94 HARV. L. REV. 1871, 1875-76 (1981) (distinguishing between "Agency Oversight Model," in which agency does not participate, and "Agency Participation Model," in which it does).

[78] The cotton dust negotiation is a clear example. *See infra* Section V of this article.

Harter and Recommendation 82-4 also recognized that the consensus idea implies some kind of effective implementation process.[82] Lack of an implementation process would destroy the core prerequisite of negotiation—namely, the parties' belief that their own interests will be furthered by negotiating.

In three of the four experiments (benzene, flight-and-duty-time, and nonconference penalties (NCPs)) the participants fell short of formal agreement on some of the major issues.[83] Indeed, one could argue that fewer fundamental matters separated the benzene negotiators when negotiations were adjourned than separated the flight-and-duty-time negotiators. Even so, the benzene negotiations are widely perceived as having failed, while the flight-and-duty-time negotiations are perceived as having succeeded. The explanation for different perceptions despite the similarity of results is attributable to the difference in how the agency reacted when the negotiations were adjourned. The FAA, having participated in the negotiating sessions, had an understanding of what the parties could accept. OSHA, on the other hand, who had not participated, had no such understanding. In order for the points of agreement on benzene to be communicated to OSHA, a document had to be transmitted. However, the benzene negotiators had stipulated as a ground rule that no document would be transmitted in the absence of a formal agreement on a total package. No such ground rule bound the flight-and-duty-time or the NCP participants or agency.[84]

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[79] Harter, *supra* note 29, at 92.

[80] *Id.* at 93.

[81] Paragraph 11 of ACUS Recommendation 82-4, 1 C.F.R. § 305.82-4 ¶ 11 (1986), addressed consensus in very general terms: "Consensus . . . means that each interest represented in the negotiating groups concurs in the result, unless all members of the group agree at the outset on another definition." *Id.* That paragraph contemplated, however, that the negotiators might issue a report indicating agreement on some issues and disagreement on other issues.

[82] Harter, *supra* note 29, at 51. This criterion is addressed in part by paragraphs 13 and 14 of ACUS Recommendation 82-4, 1 C.F.R. § 305.82-4 ¶¶ 13, 14 (1986), proposing publication of a negotiated rule in the Federal Register, and giving the negotiators an opportunity to review comments submitted by nonparticipants.

[83] Paragraph 11 of ACUS Recommendation 82-4, 1 C.F.R. § 305.82-4 ¶ 11 (1986), addresses consensus, and contemplates the possibility of less than total agreement on all issues.

[84] Paragraph 11 of ACUS Recommendation 82-4, 1 C.F.R. § 305.82-4 ¶ 11 (1986),

Recommendation 82-4 proved basically sound with respect to defining consensus. As it suggests, agencies and negotiators should take a flexibie view toward defining consensus. Insisting on formal subscription to a "total package" recommendation may make negotiating success impossible; it may be infeasible for a participant to acknowledge agreement with a compromise.[85] Moreover, if the agency participates in the negotiations, a total package agreement is not necessary. Any reasonably sophisticated agency participant will sense, when negotiations are concluded, what each particular party will tolerate and what will be so offensive that the party will be moved to litigate. A sophisticated agency participant will also have a sense of what concessions are linked to gains on other issues. Furthermore, a flexible attitude toward consensus may permit substantial agreement on a framework for a rule with certain difficult issues reserved for adversarial comment and decision by the agency. In other words, a consensus can include an agreement to dispute certain issues before the agency or in the courts. Such an outcome is beneficial because it narrows the issues. The FAA experience is a good example.[86]

On the other hand, a total package ground rule forces the parties to make more compromises, instead of leaving tough issues for the agency to resolve. One possible standard for a consensus rule is to say that a consensus has been obtained when all participants agree informally that they will not actively oppose a particular resolution of issues, though certain of their constituents might register formal opposition.

The prospects of consensus greatly increase with the employment of a mediator in rule negotiations. Paragraph five of Recommendation 85-5 said:

> 5. The agency should select a person skilled in techniques of dispute resolution to assist the negotiating group in reaching an agreement. In some cases, that person may need to have prior knowledge of the subject matter of the negotiations. The person chosen may be styled "mediator" or "facilitator," and may be, but need not be, the same person as the "convenor" identified in Recommendation 82-4.[87]

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contemplates that negotiators report on less than total agreement, identifying the issues on which they agree and those on which they disagree.

[85] Everyone with labor-management negotiation experience is familiar with the common phenomenon in grievance dispute processing where labor and management reach de facto agreement on resolution of a grievance but need an arbitrator's decision to "take them off the hook." In some cases, the disputing parties actually write the arbitrator's decision.

[86] *Evaluation of Recommendations, supra* note 5, at 1670-71. *See also* 49 Fed. Reg. 12,136, 12,137-38 (1984) (to be codified at 14 C.F.R. §§ 121, 135).

[87] 1 C.F.R. § 305.85-5 ¶ 5 (1986). Convenors and mediators play different roles in

The recommendation noted that there may be specific proceedings, however, where party incentives to reach voluntary agreement are so strong that a mediator or facilitator is not necessary.

Virtually all of the participants in the four completed rule negotiations agreed that the mediators made essential contributions to the process. In fact, it is difficult to conceive how any of the four negotiations would have worked at all without the help of the facilitator/mediators. All three agencies used both convenors and mediators.[88] In some cases, the convenor became the facilitator or mediator. In other cases, the facilitator or mediator was a different person from the convenor. Despite differences in styles, the involvement of the facilitator/mediators was essential to keep the negotiations moving.[89] Few participants or observers thought that mediators ought to originate from any particular source; rather, they emphasized the importance of mediation experience and competence. Mediation skills involve more than an ability to work well with people—they involve an instinctive awareness of group functioning and how to move toward closure.

Recommendation 85-5 reinforces the import of Paragraph ten in Recommendation 82-4,[90] suggesting that mediators should be an integral part of rule negotiations. There are advantages and disadvantages of outside and inside facilitators. Inside facilitators may be inhibited in dealing with intra-constituency problems and in intervening with other government agencies, such as OMB. In addition, private parties may be reluctant to accept the neutrality of a facilitator from within the agency. On the other hand, the use of an inside facilitator can be effective in certain cases as the pesticide negotiations illustrated.[91]

Mediation skills are highly personal, and it would be unwise to establish any exclusive institutional source of rulemaking mediation services. It may be desirable, however, to organize training and edu-

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negotiated rulemaking. Convenors assist agencies in deciding whether a particular subject is suitable for negotiated rulemaking. They determine who are the affected interests and informally contact those interests to explore the possibility of their participation in a negotiation. *Id.* § 305.82-4 ¶ 4. Mediators, on the other hand, become involved in the actual negotiation, helping the parties to agree on a procedure and to narrow their substantive differences. *Id.* § 305.82-4 ¶ 10, 305.85-5 ¶ 5. "Facilitator" is just another name for a mediator, the use of which may be desirable to reduce anxiety experienced by those who object to the idea of using a labor-management negotiation model for administrative rulemaking.

[88] Paragraphs 3 and 4 of ACUS Recommendation 82-4, 1 C.F.R. § 305.82-4 ¶¶ 3, 4 (1986), recommend use of convenors in every regulatory negotiation. Paragraph 10 recommends the use of mediators in some cases. *Id.* § 305.82-4 ¶ 10.

[89] This experience raised questions about the optional character of paragraph 10 of ACUS Recommendation 82-4. Paragraph 5 of ACUS Recommendation 85-5 urges that mediators be used in virtually all rule negotiations. 1 C.F.R. § 305.85-5 ¶ 5 (1986).

[90] 1 C.F.R. § 305.82-4 (1986).

[91] *Evaluation of Recommendations*, *supra* note 5, at 1680-82.

cational programs and to procure mediation services competitively to ensure that opportunities for potential neutrals are distributed equitably. If competitive procurement does occur, it is essential to ensure speed and to have a process for verifying the mediation experience of the bidders.

Recommendation 85-5 explicitly recognized that federal agencies such as the Federal Mediation and Conciliation Service or the Community Relations Service of the Department of Justice may be appropriate sources of mediators or facilitators.[92] It suggested that these agencies should consider making a small number of staff members with mediation experience available to assist in conducting negotiated rulemaking proceedings.

Some agencies considering negotiated rulemaking have expressed concern that the process might cost more than notice-and-comment rulemaking. Recommendation 85-5 encourages agencies to explore resources available from government agencies, such as mediation services from the Federal Mediation and Conciliation Service, or the Community Relations Service within the Justice Department, or negotiation training available from the Department of Justice.

Paragraph four of Recommendation 85-5 suggested that agencies consider providing the parties with an opportunity to participate in a training session in negotiation skills prior to the beginning of the negotiations.[93] It is worth noting that training provided in connection with the EPA negotiations was well received, and parties to the negotiation of Farmworker Protection standards requested similar training.

### *C. Intra-Constituency Problems*

The simple model of negotiation dynamics assumed monolithic parties.[94] In the real world, of course, parties are not monolithic, and intra-constituency disagreements complicate negotiations. Resolving intra-constituency disagreements depends upon the characteristics of interest groups. These groups play an essential role in the politics of a modern state,[95] providing economies of scale in the exercise of power, and permitting individual concerns about particular issues to be focused within representative institutions.[96]

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[92] 1 C.F.R. § 305.85-5 ¶ 6 (1986).

[93] 1 C.F.R. § 305.85-5 ¶ 4 (1986).

[94] *See supra* Section III, subsection A of this article.

[95] *See* THE FEDERALIST No. 10 (J. Madison); V.O. KEY, *supra* note 12, at 7 (politics is a struggle among groups or interests). *See generally* J. HURST, *supra* note 12 (balance of political power generally is determined by the strength and intensity of feeling of groups perceiving that they have similar interests on a particular subject).

Interest groups perform representation or interest aggregating functions.[97] They operate by intensifying member interest in particular issues, formulating concrete alternatives, and articulating member positions.[98]

The analysis of BATNA-driven participation choices[99] assumed that parties are monolithic, and that parties affected by regulatory decision-making behave like rational individuals dealing with a single estimate of risk. Real parties do not behave this way. Real parties are represented by individual human beings, but the individuals express the views of group constituencies which usually have divergent views. The relations within constituency groups and between constituency groups and individual negotiators complicate the dynamics of regulatory negotiation.

Experienced mediators know that there are essentially three agreements in any successful two-party negotiation: (1) an agreement between negotiator A and his constituents; (2) an agreement between negotiator B and her constituents; and (3) an agreement between negotiators A and B.[100] Agreements (1) and (2) can be called "intra-constituency agreements." Frequently, the most difficult mediation job involves achieving the intra-constituency agreements rather than achieving the negotiator-negotiator agreement.

The intra-constituency problem is more difficult in regulatory negotiations than in labor negotiations, because the parties to regulation negotiation are likely to be ad hoc groups or coalitions without formal processes worked out for internal decision-making. Ordinarily, in regulatory negotiation, there is no equivalent of the "exclusive representation" principle from the law of collective bargaining[101] available to bind constituents to the position taken by or agreed to by an industry representative. At any point an individual constituency may disavow its putative representative in the negotiations, take its own position on matters under negotiation, present formal positions to the agency inconsistent with positions taken by its "representative," or sue to have the negotiated rule set aside by the courts.

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[96] V.O. KEY, *supra* note 12, at 203 (referring to the representation function performed by interest groups).

[97] *Id.*

[98] *Id.* at 203-04.

[99] *See* discussion of the BATNA concept, *supra*, at Section III, subsection A of this article.

[100] Dunlop, *supra* note 12, at 1433 (referring to the need for three agreements to conclude a negotiation).

[101] *See* National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (1982) (exclusive representative); Railway Labor Act § 2, Ninth, 45 U.S.C. § 152, Ninth (1982) (exclusive representative).

Extreme positions by trade groups reduce intra-constituency differences, but necessarily make negotiations more difficult. When representatives must make compromises at the bargaining table, the intra-constituency problem becomes worse.

It is important for someone involved in the negotiation process, either the representatives themselves, the mediator/convenors, or the agency personnel, to be skilled at diagnosing intra-constituency problems and working creatively to facilitate intra-constituency agreement. Someone familiar with the internal structure and decision-making processes of institutions, such as labor unions, corporations, and public interest groups involved in a particular negotiation, can be indispensable. Even more valuable would be a mediator who already knows the key decision makers within a particular constituency, and therefore is trusted by them to some degree. Periodic constituency meetings may be desirable,[102] and full reporting to constituents as negotiations proceed is essential. Also, selecting negotiators with strong power bases can serve to permit freer exploration of compromises.

Recommendation 85-5 explicitly recognized the importance of intra-constituency disagreements. It said:

> 7. The agency, the mediator or facilitator, and, where appropriate, other participants in negotiated rulemaking should be prepared to address internal disagreements within a particular constituency. In some cases, it may be helpful to retain a special mediator or facilitator to assist in mediating issues internal to a constituency. The agency should consider the potential for internal constituency disagreements in choosing representatives, in planning for successful negotiations, and in selecting persons as mediators or facilitators. The agency should also recognize the possibility that a group viewed as a single constituency at the outset of negotiations may later become so divided as to suggest modification of the membership of the negotiating group.[103]

Constituency disagreements threatened both the FAA and OSHA negotiations. The success of the FAA negotiations resulted in part from a more timely resolution of such disagreements. Both the Air Transportation Association (ATA) (representing airlines) and the American Petroleum Institute (API) (representing petroleum companies) struggled to forge a consensus that could be communicated by their negotiation spokespersons. ATA had more success than API. Notably, the FAA proposed bringing individual company representatives into the negotiations. This may have galvanized ATA to ensure that it remained an effective participant on behalf of the entire constituency.

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[102] For example, this occurred with the American Petroleum Institute [hereinafter API] and the Air Transport Association [hereinafter ATA] in the benzene and flight-and-duty-time negotiations. *See Evaluation of Recommendations*, *supra* note 5, at 1670.

[103] 1 C.F.R. § 305.85-5 ¶ 7 (1986).

Students of negotiation have long recognized that the most difficult challenge to a negotiated agreement involves, not the process at the negotiating table, but the process of resolving intra-constituency disagreements away from the table. This recommendation encourages agencies to anticipate intra-constituency problems. This does not mean that the agency or the private interests know in advance exactly how to "resolve" such disagreements, only that the convenors assess the likelihood that such disagreements will occur, given the adequacy of existing institutional mechanisms for resolving them.

If internal differences are expected to be substantial, and if existing institutions are not well suited for resolving them, negotiation should not proceed in the absence of a mediator who has the experience, skill, and acquaintance with the constituency and its major personalities. Such a mediator may be able to reduce intra-constituency differences, thereby validating the authority of the spokesperson for the affected group. In some cases, a special mediator might be retained to assist the main facilitator/mediator in dealing with an internal constituency problem.

Intra-constituency problems may be more difficult under certain types of interest representation arrangements than others. For example, trade unions exist for the purpose of aggregating employee interests, and are therefore experienced in resolving differing positions within the constituency. Similarly, public interest groups have a certain authority in speaking for their otherwise diffuse constituencies. Business interests, in contrast, usually have fewer established mechanisms for resolving internal differences. Exceptions might be found in those industries long subject to economic regulation.

The potential for internal constituency disagreements should also influence the selection of interest representatives.[104] If a trade association is unable to represent its constituents effectively, it may be desirable to include individual company representatives. It may also be worthwhile convening groups of major subinterests to provide the mediator or facilitator with a forum in which to adjust internal constituency disagreements.

Agencies and mediators or facilitators should be wary, however, of fragmenting representation too much; permitting subinterests to be represented separately merely moves disagreements among these subinterests from other resolution forums to the bargaining table itself.

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[104] Selection of participants for a rule negotiation is considered in more detail in Section VI, subsection B *supra*.

## IV. Selection of Subjects For Negotiation

Considering the dynamics of negotiation, not all issues are suitable for rule negotiation. ACUS Recommendation 82-4 and agency experience suggest rules of thumb for selecting subjects for negotiation.

Issue maturity and intensity of interest group feeling are important. One commentator, who made a study of the decision to land on the moon, has drawn the following conclusion about issue maturity: "The objective must have been the subject of sufficient political debate so that the groups interested in it and opposed to it can be identified, their positions and relative strengths evaluated, and potential sources of support have time to develop."[105]

Issue maturity significantly affects the way different groups feel about a particular issue and how strongly they prefer variant alternatives. It also ensures that a range of alternatives has been formulated for consideration.

Recommendation 82-4 suggested that only mature issues be considered for negotiation.[106] The issues must be readily apparent and the parties must be ready to decide them. If information remains to be gathered or if the parties are still establishing their positions,[107] negotiation cannot be utilized. Issue maturity is significant when disputants are individuals; each disputant must have time to think about his or her position on a new question or proposal. However, it becomes far more important when the disputants are groups. Constituency positions must be determined, and this requires aggregation and trading off within the group.[108] The more complex the issue and the more novel the possible solution, the longer it will take for constituencies to make this determination.

Interest groups interact with regulatory programs. Indeed, interest groups arose in part because of increased government regulation.[109] The nature of the interaction is determined by the nature of the regulatory program because the nature of the regulation influences the intensity of interest group feeling on regulatory issues.[110]

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[105] J. Logsdon, The Decision to Go to the Moon: Project Apollo and the National Interest 181 (1970).

[106] R. Dahl, A Preface to Democratic Theory 47 (1956). This corresponds to paragraph 4(a) of ACUS Recommendation 82-4, 1 C.F.R. § 305.82-4 ¶ 4(a) (1986).

[107] Examples of this would be lobbying for public support, media support, etc. R. Dahl, *supra* note 106, at 47 & n.259.

[108] *See* Logsdon, *supra* note 105, at 81.

[109] V.O. Key, *supra* note 12, at 201-02.

[110] Intensity of feeling is an important variable in the calculus of public opinion. R. Dahl, *supra* note 106, at 50. The influence of a particular group or faction is a func-

Professor James Q. Wilson identifies three categories of regulatory programs according to incidence of costs and benefits likely to influence the intensity of group feeling.[111] In the first category, the programs concentrate their benefits on a small group and distribute their costs over wide sectors of the population. Economic regulation of railroads and airlines, milk prices and taxicabs fall into this category.

Programs in Wilson's second category concentrate on both benefits and costs. Regulatory programs relating to labor-management relations fit this category; either labor or management benefits at the expense of the other.

The third category encompasses the most recent consumer and environmental protection, health, and safety regulations. Here, benefits are diffused over large constituencies of the population while costs are concentrated on relatively narrow sectors. As Wilson points out, the development of policy is particularly difficult with respect to this category because the number of transactions subject to the regulation is likely to be far greater than in the first or second categories.

One can add a fourth category to Wilson's list. This category would include programs diffusing both costs and benefits such as automobile emissions device inspection programs.

Programs in Wilson's second category are better candidates for negotiation than programs in the fourth category, because it is easier to mobilize interest representatives for the bargaining process when the interest groups are few in number and narrow in scope. Moreover, programs with narrow impact are less likely to attract governmental or public interest.[112] Between the extremes of the second and fourth categories, Wilson's first and third categories present intermediate levels of difficulty in organizing interest representatives for regulatory negotiation. The regulatory program must be suitable for negotiation and satisfy the following criteria:

*Inevitability of Decision.*[113] There must be pressure to resolve the matter.[114] Effective negotiation requires compromise and compro-

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tion of numerosity and intensity of feeling. *Id.* at 38. Transaction costs prevent a plebiscite on every public policy alternative, and reduce the desire of interest groups to have such involvement in the full range of political decisions. *Id.* at 44. In other words, the cost-benefit ratio of participation in policy formulation is unfavorable when a potential participant is indifferent to outcome. *Id.* at 42-43.

[111] *See* Wilson, *The Politics of Regulation*, in THE POLITICS OF REGULATION 357, 366-67 (J. Wilson ed. 1980) (classifications based on group perception of costs and benefits).

[112] *See* Stewart, *The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, WIS. L. REV. 655, 670 (1985).

[113] R. DAHL, *supra* note 106, at 48. This is addressed in paragraph 4(a) of ACUS Recommendation 82-4, 1 C.F.R. § 305.82-4 ¶ 4(a) (1986).

[114] *See* Dunlop, *supra* note 12, at 1436 (deadline serves a vital function in negotiations).

mise involves making concessions. Most people are reluctant to make concessions unless they are coerced to do so by the fear that the decision will be taken away from the negotiators.[115]

*Opportunity for Gain.*[116] Negotiation must have the potential to benefit all parties. Negotiated solutions to "zero sum games" are difficult to achieve.[117] Effective mediation helps negotiating parties discover alternative formulations and to perceive the true value of their BATNA's.[118] The heightened perception of loss in alternative forums must be great enough to overcome any fear of loss through negotiation.[119]

*Absence of Fundamental Value Conflict.*[120] The regulation to be developed must not compromise deeply held beliefs or values since this would involve costs higher than most parties could tolerate.[121] This does not mean, however, that negotiation cannot be used to resolve minor issues involved in rule controversies in which fundamental values are at stake, nor does it mean that the implementation of regulations developed on a fundamental matter cannot be negotiated.[122] The fundamental value criterion is frequently misunderstood. The presence of substantial costs does not necessarily mean that fundamental values are involved. Rather, fundamental values are those which have ideological as opposed to merely economic significance, or economic risks of such magnitude that they seriously threaten a party's very survival.

*Permitting Trade-Offs.*[123] If there is only one issue to resolve or one position to assume, negotiation is unlikely to result in agreement. When there are two or more issues to resolve, however, with the attendant possibilities of gain on one issue offsetting loss on another, negotiation is more likely to be fruitful.[124]

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[115] R. DAHL, *supra* note 106, at 47-48 & n.263.

[116] *Id.* at 48-49. This corresponds to paragraph 4(e) of ACUS Recommendation 82-4, 1 C.F.R. § 305.82-4 ¶ 4(e) (1986). This criterion is not addressed explicitly in ACUS Recommendation 82-4.

[117] R. DAHL, *supra* note 106, at 48 n.284.

[118] *See* Dunlop, *supra* note 12, at 1444-46; Perritt, *supra* note 21, at 1232-35. The BATNA concept is explained in Section III, subsection A of this article.

[119] R. DAHL, *supra* note 106, at 49.

[120] *Id.* at 49-50. This corresponds to paragraph 4(b) of ACUS Recommendation 82-4, 1 C.F.R. § 305.82-4 ¶ 4(b) (1986).

[121] For example, the establishment of a public school curriculum through negotiation would be difficult if the only participants were a fundamentalist Baptist preacher and an equally committed evolutionist.

[122] R. DAHL, *supra* note 106, at 49-50.

[123] *Id.* at 50. This corresponds to paragraph 4(d) of ACUS Recommendation 82-4, 1 C.F.R. § 305.82-4 ¶ 4(d) (1986).

*Research Not Determinative of Outcome.*[125] The resolution of a dispute should not depend on research results. The parties may be unwilling to formulate or compromise positions in the face of scientific uncertainty. Research results might produce a clear victory for one party.[126] Even if a clear win or loss could result from the research findings, the parties might still choose to negotiate parallel or peripheral issues.[127]Alternatively, the parties might negotiate issues to be researched and the way in which the research should be conducted.

In the four negotiations leading up to Recommendation 85-5, several differences surfaced concerning the subject matter of negotiations and the way in which candidates for negotiation were identified. Only the EPA formally solicited suggestions for candidates for negotiated rulemaking. This survey shifted the burden to major interest groups to propose subjects which they would be willing to negotiate. While agency-wide initiative may have produced some benefits in terms of communicating clear agency support for the concept, it also may have raised fears among some affected interests that EPA was overly committed to a particular process, and might force its use without sufficiently considering its utility in a particular proceeding.

The EPA picked subjects for negotiation which had not already failed in traditional processes. OSHA and the FAA, on the other hand, chose subjects that had proved intractable in traditional rulemaking and judicial review.[128] Other differences between the history of the benzene rulemaking effort and the history of the flight-and-duty-time effort, however, made benzene the riskier candidate. No one involved in the flight-and-duty-time, NCP, or pesticide controversies really believed that a rule could be determined by objective examination of scientific data. Some of the OSHA participants believed that the matter was simply one of analyzing scientific data.[129] This inhibited the realistic exchange of concessions in the benzene negotiations because of the underlying perception that the correct standard could be determined objectively rather than through bargaining.

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[124] R. DAHL, *supra* note 106, at 50 n.274.

[125] *Id.* at 50-51. This criterion is not addressed explicitly in ACUS Recommendation 82-4.

[126] *See* Perritt, *supra* note 21, at 1253-56 (explaining how similar perceptions of probable outcomes make negotiated resolution more likely). Uncertainty can improve the attractiveness of negotiated resolution to risk-averse parties, but similar predictions of outcome are probably more important. *Id.*

[127] R. DAHL, *supra* note 106, at 51 n.276.

[128] Both approaches are consistent with ACUS Recommendation 82-4, 1 C.F.R. § 305.82-4 ¶ 4 (1986).

[129] *Evaluation of Recommendations*, *supra* note 5, at 1655-64.

## V. Post Recommendation 85-5 Developments

### *A. MDA*

The Department of Labor decided to use negotiated rulemaking to facilitate setting a standard for 4, 4' - Methylenedianiline (MDA). On October 22, 1985, the Department published a notice in the Federal Register[130] chartering a negotiation committee and soliciting requests for additional participants for the negotiations.

MDA is an adhesive identified by the National Toxicology Program as an animal carcinogen. Animal studies, epidemiological evidence, structure-activity relationships, and mutagenicity studies all indicate that MDA is also a potential human carcinogen.[131] Several thousand workers risk dermal and respiratory exposure to MDA in the chemical, rubber, and adhesive industries.

OSHA announced its intention to control workplace exposure to MDA on September 20, 1983, in an Advance Notice of Proposed Rulemaking.[132] Moreover, EPA has responsibility for regulating MDA under the Toxic Substances Control Act[133] (TSCA), but it decided to defer regulatory action to OSHA[134] and oblige OSHA to notify EPA by early January, 1986, what regulatory action OSHA intended to take.[135]

OSHA's personnel and lawyers believed MDA to be a better candidate than benzene[136] for negotiated rulemaking for the following reasons:

> 1. The possibility of EPA regulation creates special incentives for industry and labor groups to assist OSHA in developing a standard promptly. Labor has less influence at EPA than at OSHA, and Industry may fear that EPA is less sympathetic to the economic impact of health and safety standards than OSHA.
> 2. The absence of human carcinogenicity studies makes fundamental values less an issue for MDA than for benzene because there is room for argument as to the human health effects of MDA.
> 3. Fewer industries and labor organizations are concerned with MDA than with benzene.
> 4. The absence of large-scale health effects, already manifested, removes the tort liability issue which affected the benzene negotiations.[137]

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[130] 50 Fed. Reg. 42,789 (1985).

[131] *Id.* at 42,791.

[132] 48 Fed. Reg. 42,836 (1983).

[133] 15 U.S.C. §§ 2601-2629 (1983).

[134] *Id.* § 2608(a).

[135] 50 Fed. Reg. 27,674 (1985).

[136] Benzene was selected by OSHA for negotiated rulemaking, but now OSHA considers that benzene was, in some respects, unsuitable for negotiation.

[137] *See Evaluation of Recommendations*, *supra* note 5, at 1651-52.

> 5. Because there is no existing standard for MDA and consequently no litigation history, party positions are less concrete and there is less polarization among parties.
> 6. The process OSHA intends to use for MDA standard negotiations is expected to work better than the process used for benzene negotiations.

OSHA modeled its MDA negotiations after the FAA and EPA negotiations. It chartered an advisory committee as the forum within which negotiations will occur. OSHA participated actively in the MDA negotiations, expecting that this participation would increase the usefulness of the negotiations.[138] Because OSHA contemplated that consensus would be defined more broadly than it was in the benzene negotiations, it expected to gain a sense of the feasibility of different types of standards, rationales for party positions, and narrowing of issues, even if the negotiators had been unable to agree on a Permissible Exposure Limit (PEL).[139] OSHA used a mediator assigned by the Federal Mediation and Conciliation Service as a facilitator.[140]

The Federal Register notice, following the example of the FAA and EPA notices, identified thirteen specific issues for the negotiations to address, listed potential participants, and invited comments on the makeup of the negotiating group.[141] The notice committed OSHA to use any negotiating consensus as the basis for its Notices of Proposed Rulemaking (NPRM) for MDA[142] but declared that OSHA would terminate the negotiations and proceed on its own if no consensus is reached within six months.[143] It is, of course, too early to evaluate the efficacy of MDA negotiations, because no NPRM had been published when this article went to press. The fact that OSHA attempted negotiated rulemaking for another health standard is significant because it demonstrates that the benzene effort, though not successful in producing an agreed-upon standard, was successful as a pilot effort in exploring a new process.

Negotiations on the MDA standard began in July, 1986 and proceeded until a consensus was reached in May, 1987.[144] The author has attended MDA negotiating sessions and has met informally with most of the participants. Nevertheless, it is possible to offer some observations about the process by comparing it with the benzene negotiation process.

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[138] 50 Fed. Reg. 42,792 (1985) (OSHA representative will be a full and active participant).

[139] *Id.* at 42,791 (referring to the "rank[ing of] priorities and identif[ication of] acceptable solutions" as well as agreement on regulatory text and supporting rationale).

[140] *Id.*

[141] *Id.* at 42,792.

[142] *Id.* at 42,790.

[143] *Id.* at 42,792.

[144] *Id.* at 42,787 (establishing the Negotiated Rulemaking Advisory Committee on 4,4'—Methylenedianiline [hereinafter MDA] to "advise the secretary of labor regarding the building of consensus by affected interests on issues associated with a proposed OSHA standard on MDA"); *id.* at 42,789-93 (announcing plans for MDA rule negotiation, proposing committee procedures, and identifying 13 issues to be addressed); *id.* at 48,655 (announcing an extension of time for submitting comments and requests for membership on negotiation committee); *id.* at 44,337 (regulatory agenda proposing schedule for negotiated rulemaking to result in NPRM by March, 1986); 51 Fed. Reg.

Active participation by OSHA was helpful. In fact, in the MDA negotiations, the OSHA participant regularly prepared draft NPRM language synthesizing OSHA's tentative views and those expressed by participants in the negotiations. This relieved participants from having to agree or disagree with language prepared by an opposing interest. In addition, OSHA prepared post-discussion drafts providing concrete material for negotiators to consider, reinforcing the view that OSHA would develop an NPRM on its own if the negotiations did not produce consensus. On the other hand, the process imposed significant administrative burdens on the OSHA participant, and posed an intellectual challenge to adequately capture the views expressed in the negotiation sessions.

Compliance with the Federal Advisory Committee Act[145] (FACA) did not appear to present any difficulties. The negotiation sessions were regularly open to the public and participants have not reported any particular problems with this format.

All participants were enthusiastic about the process, and reported that whether or not consensus was achieved, they had achieved a greater understanding of their opponent's legitimate difficulties. The

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6,748-50 (1986) (responding to EPA notice of July 5, 1985, 50 Fed. Reg. 27,674 and announcing consideration of negotiated rulemaking to develop standard); *id.* at 14,202 (regulatory agenda announcing plans for mediated rulemaking, with NPRM scheduled for October, 1986, and final action by December, 1987); *id.* at 24,452 (announcing appointment of members of negotiating committee and announcing first meeting for July 22-24, 1986; stating that oral presentations by members of the public will be permitted under control of the Mediator/Chairman; relaxing requirement for verbatim transcript and providing for detailed minutes instead, and modifying quorum requirements so that two members representing employers and two representing employees must be present to conduct business); *id.* at 27,919 (announcing meetings and topics: August 5, 1986, scope and application, definitions, recordkeeping, emergencies, hygiene facilities and housekeeping; September 9, 1986, personal protective equipment, exposure monitoring, and site visit; October 7, 1986, health effects, risk assessment, medical surveillance, medical appendices, biological monitoring, and removal and rate retention; November 16, 1986, technological and economic feasibility; December 9, 1986, permissible exposure limits, including short term exposure limits and action level discussions; and January 13, 1987, review of committee recommendations for Federal Register publication); *id.* at 35,571 (announcing location changes for meetings for October 7, 1986, November 18, 1986, December 9, 1986, and January 13, 1987); *id.* at 36,876 (renewing negotiating committee and changing name to "Mediated Rulemaking Advisory Committee"); 52 Fed. Reg. 26,776 (1987) (committee's consensus standard).

[145] 5 U.S.C. app. §§ 1-15 (1982).

greatest concern was the procedure that OSHA would use to implement the consensus recommendation. In addition, concerns persist as to OMB's willingness to substantially defer to a consensus recommendation.

### *B. Additional EPA Rule Negotiations*

Since ACUS Recommendation 85-5 was published, the EPA has continued to use the negotiated rulemaking process. Negotiations over a farmworker protection standard continued through the Spring of 1986.[146]

The committee began by framing the issues that a regulation should address and the factors that would enter into their resolution. Its work groups incorporated their first-hand knowledge of farming operations. EPA consultants wrote a working draft of a potential regulation that the committee used to focus its discussions. Although one of the major labor unions involved withdrew its participation, the remaining interests decided to continue reviewing the draft regulation and to formulate a sound, workable standard. It was clear that with one of the major interests absent, such discussions would not reflect a true consensus rule, so the group was converted into a standard advisory committee and EPA accepted sole responsibility for the proposed rule. The truncated group met twice more and reviewed the evolving draft. EPA's Office of Pesticide Programs built on the earlier discussions. EPA has not yet published its notice of proposed rulemaking, but it is expected shortly.

Although the farmworker protection negotiations, like those in benzene, did not result in consensus, some of the participants, including senior agency officials, viewed the negotiations as significantly productive and expect them to have a major effect in shaping the proposed standard.[147] In addition, the EPA has proposed negotiations to develop rules on air pollutant emissions from wood burning stoves,[148] hazardous waste injection wells,[149] and the Resource Conservation and Recovery Act[150] (RCRA) permits.[151]

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[146] 50 Fed. Reg. 42,223 (1985) (announcing establishment of advisory committee to negotiate farmworker protection standards for agricultural pesticides, and initial meeting on November 4, 1985, to complete outstanding procedural matters, and to determine how to address substantive issues and begin addressing them); *id.* at 48,130 (announcing meeting of the farmworker protection standards negotiating committee for December 6, 1985, to address issues of protective clothing, reentry intervals, notification, training, enforcement, greenhouses, nurseries, and medical monitoring); *id.* at 51,748 (announcing meetings of the farmworker protection standards committee for January 7, 1986, and February 4, 1986, to continue work on substantive issues identified in November 21 notice); 51 Fed. Reg. 6,595 (1986) (announcing two-day meeting of negotiating committee for March 6th and 7th, 1986, to address procedural issues arising since last meeting and to continue work on substantive issues); *id.* at 13,091 (announcing two-day meeting of negotiating committee for May 5th and 6th, 1986, to review latest version of draft proposal).

[147] Letter from Philip J. Harter to Henry H. Perritt, Jr. (Nov. 3, 1986) (reporting the breakdown in the farmworker protection negotiations and its subsequent developments).

### *C. Federal Trade Commission Negotiation Initiative*

On February 12, 1986, the Federal Trade Commission (FTC) announced that it was considering forming an advisory committee to negotiate a consensus on recommended revisions to the FTC's rules on informal dispute settlement procedures.[152] The informal dispute settlement procedure rule implemented section 110(a)(1) of the Magnuson-Moss Warranty Act.[153] That section provides that written warranties may require consumers to resort to an informal dispute settlement procedure before pursuing any judicial remedies available under the Act. The FTC's rule has been criticized as being both unduly burdensome and insufficiently stringent.[154] The Commission believed that negotiation of possible changes was particularly appropriate because of the voluntary nature of Rule 703.[155] Based on preliminary inquiry by two professional mediators (John A. S. McGlennon and Gail Bingham) of the Conservation Foundation, the FTC believed that negotiation could succeed with respect to the rule.[156] The February 12, 1986, notice proposed procedures for negotiation, identified fifteen substantive issues to be addressed in the negotiation, and listed twenty-six potential parties to be members of a negotiating committee.[157]

On August 20, 1986, the FTC established a "Rule 703 Advisory Committee" to develop proposed revisions to Rule 703 and announced that its first meeting would be held on September 23, 1986.[158] The Commission received twenty-two comments in response to its proposal to use negotiated rulemaking in connection with Rule 703 revisions. Only one comment opposed the process, arguing that consumer groups and consumer protection agencies could not adequately represent consumer interests.[159] The FTC responded that a wide variety of consumer interest representatives would participate on the committee and therefore consumer views would be adequately protected. Furthermore, the Commission noted that subsequent procedural steps, after the Advisory Committee completed its work, would "provide ample opportunity for individual consumers and others to comment on any [Committee] consensus . . . ."[160]

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[148] 51 Fed. Reg. 4,800 (1986) (requesting comments on possible establishment of advisory committee to negotiate issues leading to an NPRM on New Source Performance Standards for Residential Wood Combustion under section 111 of the Clean Air Act).

[149] 42 U.S.C. § 6901-6987 (1982).

[150] *Id.* at 25,401 (requesting comments on possible establishment of advisory committee to negotiate issues leading to an NPRM implementing restrictions on injection of hazardous waste mandated by sections 3004(f) and (g) of the Resource Conservation and Recovery Act).

[151] *Id.* at 25,739 (requesting comments on possible advisory committee to negotiate issues leading to NPRM amending current regulations governing major and minor modifications to Resource Conservation and Recovery Act permits).

[152] *Id.* at 5,205.

[153] 15 U.S.C. § 2310(a)(1) (1982).

[154] 51 Fed. Reg. 5,206 (1986).

[155] *Id.*

[156] *Id.*

[157] *Id.* at 5,207-08.

The FTC identified three groups whose interests would not be represented adequately by the parties appearing on the list: organizations that assist consumers in auto industry dispute resolution proceedings, state legislatures, and the recreational vehicle industry.[161] The FTC added representatives of those three groups to the Committee and reported that some representatives had agreed to withdraw to prevent the Committee from becoming too large.[162] Representatives who appeared on the original but not the final list were the Conference of Consumer Organizations, the United States Office of Consumer Affairs, the Association of Home Appliance Manufacturers, and the Residential Warranty Corporation.[163] The rule negotiation is proceeding with agreement expected in 1987.[164]

## VI. Position of Negotiated Rulemaking Under APA

### A. *Introduction*

In 1982, ACUS recommended that Congress amend the APA to explicitly authorize the use of negotiated rulemaking.[165] Early commentators on the regulatory negotiation concept thought that it might be necessary to alter judicial review to accommodate negotiated rulemaking.[166] Some discussion of APA problems associated with negotiated rulemaking appears in the literature.[167]

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[158] *Id.* at 29,666.

[159] *Id.* at 29,667.

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *Compare* 51 Fed. Reg. 5,207-08 (1986) *with id.* at 29,668.

[164] As of January 22, 1987, the parties were meeting weekly and anticipated agreement by April or May, 1987. Mr. McGlennon cautioned, however, that the negotiations had not reached the most difficult issues. Telephone interview by the author's research assistant, Scott Fegley, and McGlennon, mediator (Jan. 22, 1987).

[165] *See* ACUS Recommendation 82-4, 1 C.F.R. § 305.82-4 ¶ 2 (1986).

[166] *See* Harter, *supra* note 29, at 102-03; Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975); Note, *Rethinking Regulation: Ne-*

Since 1982, however, it has become clear that rule negotiations can be accomplished within the flexible framework provided by section 553 of APA. Through the negotiated rulemaking process, agencies provide affected parties with an opportunity to influence the substance of agency rules to a far greater extent than the minimum requirements of section 553 by having notice of an agency-developed proposal and providing comments. Problems with the delegation of governmental authority to private parties, ex-parte communication in violation of the spirit of section 553, and open meeting requirements under FACA have turned out to be largely illusory.

There are some caveats, however, to these conclusions. If a negotiated rule is to withstand challenge under the standards for judicial review set forth in section 706 of APA, the agency must act within its statutory mandate and must provide its own reasoned justification for the final rule. It would not be sufficient for the agency merely to adopt the work of the negotiating parties without comment. Moreover, the requirements of FACA continue to trouble participants in negotiated rulemaking. The FACA has not been a problem because the Act has been interpreted in a practical way and no affected parties were motivated to challenge the negotiation process.

Analyzing administrative law issues is necessarily academic as no judicial challenges to negotiated rules have yet materialized. This lack of judicial challenge is perhaps the strongest endorsement of negotiation as a process that satisfies the needs of the affected interests. Consequently, there is no way to gauge the need for legislation dealing with the authority of agencies to implement negotiated rulemaking,[168] or the need for changes in the standards of judicial review.[169]

It is premature to consider amendments to the APA. The APA itself was a product of several decades of experimentation at the agency level. Further exploration is necessary to determine whether APA amendments are desirable and if they are, what form they should take. The risk of prematurely amending the APA is that flex-

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*gotiation as an Alternative to Traditional Rulemaking*, 94 HARV. L. REV. 1871, 1883-90 (1981) [hereinafter *Rethinking Regulation*].

[167] *See* Wald, *Negotiations of Environmental Disputes: A New Role for the Courts?*, 10 COLUM. J. ENVTL. L. 1 (1985).

[168] Paragraph 2 of ACUS Recommendation 82-4, 1 C.F.R. § 305.82-4 ¶ 2 (1986) recommends such legislation.

[169] Harter recommended such changes. Harter, *supra* note 29, at 102.

ibility in adapting the negotiation process to the needs of different regulatory situations may be destroyed.

An example of reduced flexibility is Senate Resolution 451, introduced by Senator Levin.[170] The bill contains many desirable provisions, particularly those relating to coverage by the FACA and the procedure for closing negotiation group meetings. In other respects, however, it confines the negotiation process too narrowly, especially with respect to the definition of consensus,[171] the selection and role of mediators,[172] and the continued activities of a negotiating group after it has reached consensus and made a recommendation to an agency.[173]

### *B. Delegation Doctrine*

Superficially, negotiated rulemaking seems to pose problems with the "delegation doctrine." A central precept of democratic political theory posits that governmental decisions ought to be made only by politically accountable officials. The delegation doctrine prohibits such officials from delegating their policy-making authority to persons or institutions that are not politically accountable.

In the early years of administrative law, courts and lawyers were preoccupied with the delegation doctrine as they sought to rationalize the exercise of political power by non-elected administrative agency officials.[174] It is now well accepted, however, that the delegation of quasi-legislative authority to administrative agency officials is permissible if the empowering statute sufficiently circumscribes the exercise of such power so as to permit judicial scrutiny of whether the agency has exceeded its delegated authority.[175] Implicit in this doctrine approving delegation to administrative agencies is the idea that agency officials are themselves politically accountable to some degree. They are government officers, appointed pursuant to law.[176]

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[170] S. Res. 451, 99th Cong., 1st Sess., 131 CONG. REC. 1350-53 (daily ed. Feb. 7, 1985).

[171] *Id.* § 4(8), at 1350.

[172] *Id.* § 6, at 1351.

[173] Section 7(h) of Senate Resolution 451 contemplates termination of a negotiating group before it has an opportunity to review comments submitted in response to its recommended rule. *Id.* § 7(h), at 1352.

[174] *See* Industrial Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 672-73 (1980) (Rehnquist, J., concurring); Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935); Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935) (invalidating statute delegating authority to private industry group); J. DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 15 n.25 (1927); Stewart, *supra* note 17, at 1672-73.

[175] *Industrial Union Dep't*, 448 U.S. at 673-75 (Rehnquist, J., concurring); Yakus v. United States, 321 U.S. 414, 426 (1944).

[176] Political accountability is obvious, albeit indirect, when the agency officials are appointed by the President. *See* Buckley v. Valeo, 424 U.S. 1, 135 (1976) (invalidating

When cabinet level officers make decisions, for example, political accountability is assured by the political forces operating on the President in connection with high level appointments, and by the constitutional requirement of Senate confirmation. Accountability is less evident when lower level officials make decisions, but it is presumably ensured to some degree by appointment procedures set forth in the civil service laws and by various conduct restrictions.

If, however, the agency delegates *its* authority to a group of private citizens, this raises further delegation problems. One such problem is whether the power to delegate is within the agency's mandated authority. Another problem is that the private delegates are even less accountable politically than the agency officials.[177]

While it is appropriate to think about delegation issues associated with negotiated rulemaking,[178] it is important not to exaggerate the magnitude of the problem. Negotiated rulemaking does not violate the delegation doctrine for a number of reasons.

First, under all current conceptions of negotiated rulemaking, including ACUS Recommendations 82-4 and 85-5, negotiators play only an advisory role to the agency; the agency retains the final decision-making authority.[179] Such an advisory role has been approved by the courts in a variety of circumstances.[180] Delegation is obviously per-

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the regulatory scheme depriving the President of power to appoint agency members, vesting it instead in legislative branch officers).

[177] *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936) (invalidating a statute delegating wage-and-hour standard setting to representatives of coal producers and coal miners); Aqua Slide 'N' Dive Corp. v. CPSC, 569 F.2d 831, 843-44 (5th Cir. 1978) (courts should not defer to opinions of private consultants hired by government as much as to agency personnel). *See generally* Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937); Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L.J. 650 (1975).

[178] *See, e.g.*, Harter, *supra* note 29, at 107-09; *Rethinking Regulation*, *supra* note 165, at 1880-83.

[179] Harter, *supra* note 29, at 109 (acknowledging the need to grant final approval power to the agency in a regulatory negotiation scheme); *Rethinking Regulation*, *supra* note 165, at 1882-83 (noting judicial willingness to uphold delegation where the agency retains final approval power).

In all of the negotiated rulemaking efforts reviewed in this article, agencies unequivocally reserved final decision-making authority. *See* 50 Fed. Reg. 29,306 (1985) (involving FAA); 49 Fed. Reg. 17,576 (1984) (involving EPA nonconformance penalties); *id.* at 31,145 (involving EPA pesticide exemptions).

[180] *See* Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 397-400 (1940) (approving, against delegation challenge, a statute permitting coal producers to propose minimum prices and other sales conditions to the public commission that could approve, disapprove, or modify them); First Jersey Sec., Inc. v. Bergen, 605 F.2d 690, 697-700 (3rd Cir. 1979) (approving self-regulation in securities markets), *cert. denied*, 444 U.S. 1074 (1980); Ass'n of Am. Physicians & Surgeons v. Weinberger, 395 F. Supp. 125,

missible when private parties to an agency proceeding get together and compromise their differences.[181]

Second, the nature of negotiated rulemaking, as pursued under the ACUS recommendations, ensures adequate representation of affected groups. It provides a standard of political accountability, which is probably greater than when the agency makes rules unilaterally. Thus, negotiated rulemaking escapes the problem of unaccountable decision-making which the delegation doctrine is intended to avoid.[182] If the affected parties have been represented fairly in the negotiation process, political accountability exists, and there is no need to be wary of delegation because the potential harm has been avoided *ab initio*.

The delegation doctrine overlaps other requirements imposed on agency decision-making by the APA and substantive statutes.[183] Most delegation problems are avoided when rules are subject to judicial review under APA standards.[184] If the rule forged from negotiated rulemaking passes judicial scrutiny under the arbitrary and capricious, within-statutory-authority, and in-accord-with-statutory procedures standards, it perforce passes the delegation doctrine.

### C. *Prohibition of Ultra Vires Agency Action*

Inherent in the modern delegation doctrine is the idea that agencies must act within the limits of the authority delegated to them. Consequently, delegated authority must be accompanied by ascertainable standards susceptible to judicial review.[185] Accordingly, an essential aspect of judicial review of agency decision-making entails inquiring into whether the agency acted within statutory authority or, conversely, whether it acted *ultra vires*.[186]

The use of any particular procedure to aid agencies in decision-making cannot expand the authority delegated to an agency by Congress. Therefore, an essential part of judicial review of agency decisions must involve determining whether the decision is consistent

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140 (N.D. Ill. 1975) (the private establishment of standards to govern health care was not an invalid delegation because agency provides hearing on standards). *See generally Rethinking Regulation*, *supra* note 165, at 1882 n.63 (citing other cases approving delegation to private organizations).

[181] *See* Section V of this article *supra* regarding the cotton dust negotiation.

[182] Harter, *supra* note 29, at 109; *Rethinking Regulation*, *supra* note 165, at 1883.

[183] These requirements are considered in Section VI, subsection C and G of this article *infra*.

[184] Stewart, *supra* note 17, at 1674-76.

[185] Industrial Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 686 (1980) (reviewing delegation doctrine) (Rehnquist, J., concurring).

[186] *See* Section of Administrative Law, American Bar Association, *A Restatement of Scope-of-Review Doctrine*, 38 ADMIN. L. REV. 235, 246 (1986) [hereinafter *ABA Restatement*].

with the agency's statutory authority.[187]

### *D. Conflict Between Goals of Informality and Judicial Reviewability*

Negotiated rulemaking is partly a reaction to the schizophrenic nature of informal rulemaking under APA. The APA requirements are driven by conflicting goals of informality and judicial reviewability.

As originally conceived, informal rulemaking under the APA was not adjudicatory in character. Kenneth Culp Davis, one of the deans of American administrative law, observed that the "rulemaking procedure described in [section 553 of the APA] is one of the greatest inventions of modern government. It can be, when the agency so desires, a virtual duplicate of legislative committee procedure . . . ."[188]

The participation norm, and all of the administrative law doctrines reviewed here militate against negotiation of a final rule without some opportunity for public comment.[189] Using negotiations to prepare a proposed rule, and then allowing notice-and-comment rulemaking (as occurred in all three of the successfully negotiated rulemaking experiments)[190] is a sound approach with few apparent disadvantages. Moreover, such publication and comment mitigates the effect of nonparticipants' complaints that they were denied a fair opportunity to influence the content of the rule.[191]

Negotiations can be useful at several stages of rulemaking proceedings.[192] For example, negotiating the terms of a final rule can be useful even after publication of proposed rule. Usually, however, negotiations should be used to help develop a notice of proposed rulemaking, with negotiations to be resumed after comments on the notice are received, as contemplated by paragraphs thirteen and fourteen of Recommendation 82-4. The Harter model and all of the completed negotiated rulemaking efforts envision negotiations over the content of an NPRM before it is issued. This is actually the best time for negotiations to occur.

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[187] 5 U.S.C. § 706(2)(C) (1982).

[188] K. DAVIS, ADMINISTRATIVE LAW TEXT § 6.03, at 142-43 (3d ed. 1972). Davis admitted, however, that adjudicatory procedure might be "indispensable" when "facts about parties are in dispute." *Id.* at 143.

[189] Paragraph 13 of ACUS Recommendation 82-4, 1 C.F.R. § 305.82.4 ¶ 13 (1986) provides for the publication of a negotiated rule for comment.

[190] *See Evaluation of Recommendations, supra* note 5, at 1671-72, 1679, 1681-82.

[191] *See id.* at 1673-74 (the FAA response to such complaints).

[192] This summarizes paragraph 3 of ACUS Recommendation 85-5, 1 C.F.R. § 305.85-5 ¶ 3 (1986).

However, negotiations can also begin after an NPRM is published.[193] In post-NPRM negotiations, the NPRM can sharpen the issues to be dealt with by the negotiators, and can make certain options more concrete and less theoretical.[194] When negotiations begin after a record is developed on an NPRM, through hearings or otherwise, the agency can sit down with participants to decide what conclusions should be drawn from this record.[195] In other words, the negotiation would comprise a series of informal meetings with parties to the hybrid rulemaking hearings. The relevant statutes do not preclude this procedure. The FACA open meeting requirements might be handled under the litigation exception,[196] and representation problems may have been already resolved in connection with the rulemaking hearings.[197]

The federal courts, however, have been concerned with more than just the participation of affected interests; they have also insisted on meaningful judicial review of agency decision-making. Increasingly, courts have required that informal rulemaking be more formal. Hybrid rulemaking is prominent among the techniques employed to increase formality.

### *E. Hybrid Rulemaking*

Hybrid rulemaking refers to a set of procedures imposed by Congress or the courts.[198] Under hybrid rulemaking, agencies must develop an evidentiary base for rules under procedures less formal than full trial-type hearings, but more elaborate than section 553 notice-

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[193] Post-NPRM review of comments occurred at FAA and EPA as a continuation of pre-NPRM negotiations, but the point made in the text suggested that negotiations might be *commenced* after an NPRM is issued, as occurred with the cotton dust controversy.

[194] In some respects, the benzene negotiations benefited from such sharpening because of the earlier litigation.

[195] Post-NPRM negotiations are more vulnerable to APA ex-parte communication criticisms. *See* Section VI, subsection F of this article *infra*, but the agency can mitigate these concerns by putting minutes of post-NPRM negotiating sessions in the rulemaking record.

[196] *See* 5 U.S.C. § 552b(c)(10) (1982), applicable to advisory committees by the Federal Advisory Committee Act [hereinafter FACA] section 10 (authorizing the closure of a meeting concerning the determination of a matter on the record after opportunity for a hearing).

[197] *See* Consumer's Union of the United States v. Dep't. of Health, Educ. & Welfare, 409 F. Supp. 473 (D.D. 1976), *aff'd*, 551 F.2d 466 (D.C. Cir. 1977); Food Chemical News, Inc. v. Davis, 378 F. Supp. 1048 (D.D.C. 1974).

[198] *See generally* Pederson, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38 (1975); Williams, *"Hybrid Rulemaking" under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401 (1975).

and-comment procedures.[199] Examples of statutory requirements for hybrid rulemaking are found in the Occupational Safety and Health Act,[200] and the Magnuson-Moss Act.[201]

Originating with *United States v. Nova Scotia Food Products Corp.*,[202] the idea that informal rulemaking ought to be accomplished "on the record" gained support.[203] In *Mobil Oil Corp. v. FPC*,[204] for example, the court interpreted a statute requiring that a rule be supported by substantial evidence to obligate the agency to use certain elements of adversarial or adjudicative procedures in developing the rule. Other courts have followed similar reasoning.[205]

In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,[206] the Supreme Court rejected the idea that courts may require more than the minimum procedures imposed by section 553 of the APA.[207] The *Vermont Yankee* decision has made courts reluctant to require trial-type procedures in notice-and-comment rulemaking,[208] but they continue to require that the "record" in notice-and-comment rulemaking support the agency's decision.[209]

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[199] *See generally* ACUS Recommendation 76-3, 1 C.F.R. § 305.76-3 (1983) ("Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking").

[200] 29 U.S.C. § 655(b)(3) (1970) (requiring public hearing on written objections to proposed rules).

[201] 15 U.S.C. § 57a (1982) (requiring opportunity for rebuttal submissions and cross examination when the Federal Trade Commission [hereinafter FTC] determines that regulations involve disputed issues of material fact).

[202] 568 F.2d 240 (2d Cir. 1977).

[203] *See* Pederson, *supra* note 198, at 38.

[204] 483 F.2d 1238 (D.C. Cir. 1973).

[205] *See* International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973) (requiring cross examination); Appalachian Power Co. v. Ruckelshaus, 477 F.2d 495 (4th Cir. 1973) (requiring cross examination); Kennecott Copper Corp. v. EPA, 462 F.2d 846 (D.C. Cir. 1972) (requiring EPA to articulate the basis for a rule in detail).

[206] 435 U.S. 519 (1978).

[207] *See* Byse, *Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 HARV. L. REV. 1823 (1978); Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805 (1978).

[208] *See* Lead Indus. Ass'n v. EPA, 647 F.2d 1130, 1169-71 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980) (industry failed to show "compelling circumstances" requiring cross-examination); United Steel Workers v. Marshall, 647 F.2d 1189, 1203 n.6, 1227-28 (D.C. Cir. 1980) (denying right to cost-benefit analysis and cross-examination), *cert. denied*, 453 U.S. 913 (1981). ACUS Recommendation 76-3, 1 C.F.R. § 305.76-3 (1983) identifies, for agency consideration, some additions to notice-and-comment procedures that may be warranted in some rulemaking proceedings. As a general rule, it recommends that adversarial procedures should not be superimposed on informal rulemaking.

[209] *See* Cotter v. Harris, 642 F.2d 700 (3d Cir. 1981); Sholly v. NRC, 651 F.2d 792 (D.C. Cir. 1981) (Judges Tamm, MacKinnon, Robb, and Wilkey dissenting from denial of rehearing en banc), *cert. granted*, 451 U.S. 1016 (1981); PPG Indus. v. Costle, 630

Negotiated rulemaking is a way to develop a rule and marshal facts supporting the rule without the expense, delay and rigidity associated with adversarial adjudicatory procedures. After the text of a rule is negotiated, the agency should publish it as an NPRM and articulate its own rationale for the rule adopted.[210] APA review of a negotiated rule can be protected by negotiating what the parties will put in the rulemaking record, and what the agency will say in support of the rule.

In the three cases where negotiators reached full or partial agreement, the agencies published the negotiated rule for comment,[211] clearly indicating changes from the negotiated text. In addition, both the FAA and EPA allowed the negotiators to review comments submitted in response to the Federal Register Notice.[212] Participants were generally satisfied with this approach to agreement implementation.

### *F. Ex-Parte Communications*

Negotiated rulemaking potentially contravenes a policy against ex-parte communication, derived from the hybrid rulemaking concept.[213] This section explains the ex-parte communication prohibition and concludes that it need not impede negotiated rulemaking.

Notions of fairness and due process preclude ex-parte communication between parties and the decision-maker in an adjudicatory process. Fundamental concepts of adjudicatory decision-making contemplate that decisions be based on the formal record, and that adversaries have the right to know and to counter information included in the decision-making record.[214] Ex-parte communication jeopardizes these principles in two respects: first, the opposing parties do not know the content of the ex-parte conversation so they cannot respond to it; second, the ex-parte communication usually is not made a part of the record, and thus should not influence the decision.

The on-the-record requirements resulting from the hybrid rule-

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F.2d 462 (6th Cir. 1980). *See generally* Rodgers, *A Hard Look at Vermont Yankee: Environmental Law Under Close Scrutiny*, 67 GEO. L.J. 699 (1979).

[210] Such an opportunity for comment is required by the APA. 5 U.S.C. § 553 (1982).

[211] Paragraph 13 of ACUS Recommendation 82-4, 1 C.F.R. § 305.82-4 ¶ 13 (1986), envisions such publication.

[212] Paragraph 14 of ACUS Recommendation 82-4, 1 C.F.R. § 305.82-4 ¶ 14 (1986), recommends such review.

[213] *See Rethinking Regulation*, *supra* note 165, at 1887-89 (suggesting that the ex-parte problem could be avoided in negotiated rulemaking by limiting judicial review to the question of whether the party claiming harm was represented adequately in negotiations).

[214] *See* Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267, 1279-94 (1975) (identifying "right to know opposing evidence," and "right to have the decision based only on the evidence presented" as basic elements of adjudicatory process).

making cases naturally raise questions about the appropriateness of ex-parte communications in informal rulemaking. In *Home Box Office, Inc. v. FCC*,[215] the court articulated stringent limitations on ex-parte contact in conjunction with informal rulemaking:

> 1. Once an NPRM is issued, agency officials or employees likely to be involved in the decision-making process should "refus[e] to discuss matters relating to the disposition of a [rulemaking proceeding] with any interested private party, or an attorney or agent for any such party prior to the [agency's] decision . . . .
> 2. If *ex-parte* contacts nonetheless occur . . . written documents or summar[ies] of . . . oral communications must be placed in the rulemaking file established for public review and comment."[216]

The *Home Box Office* restrictions have been applied reluctantly by the courts of appeal,[217] and have been criticized by commentators[218] and by the ACUS[219] as inconsistent with both the realities of agency decision-making and with the concept of informal rulemaking.

Major questions about the propriety of the *Home Box Office* limitations were raised by the District of Columbia Circuit in *Sierra Club v. Costle*.[220] *Sierra Club* involved ex-parte contacts between the EPA and coal industry representatives, members of Congress, and the White House staff after the end of the comment period on a proposed limitation on sulfur dioxide emissions. The court declined to invalidate the rule because of the contacts:

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[215] 567 F.2d 9 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1978).

[216] *Id.* at 57. Another formulation of the concerns raised by ex-parte communication in notice-and-comment rulemaking was articulated in ACUS Recommendation 77-3, 1 C.F.R. § 305.77-3 (1983) ((1) decision-makers may be influenced by communications made privately, thus creating a situation seemingly at odds with the widespread demand for open government; (2) significant information may be unavailable to reviewing courts; and (3) interested persons may be unable to reply effectively to information, proposals or arguments presented in an ex-parte communication).

[217] *Compare* Iowa State Commerce Comm'n. v. Office of Fed. Inspector, 730 F.2d 1566, 1576 (D.C. Cir. 1984) (rate determinations for Alaska pipeline not invalid because ex-parte contacts occurred) *and* Katharine Gibbs School v. FTC, 612 F.2d 658 (2d Cir. 1979) (complaints about contacts between decision-maker and agency staff advocates should be addressed to Congress) *and* Hercules, Inc. v. EPA, 598 F.2d 91 (D.C. Cir. 1978) (contacts between decision-maker and agency staff advocates for assistance in reviewing record reluctantly approved because of volume of record) *and* Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977) (rejecting challenge to ex-parte discussions leading to acceptance of industry self-regulation in lieu of Commission's regulation of children's programming) *with* United States Lines v. Fed. Maritime Comm'n, 584 F.2d 519 (D.C. Cir. 1978) (overturning approval of industry agreement because of reliance on material outside record).

[218] *See* Gellhorn and Robinson, *Rulemaking "Due Process": An Inconclusive Dialogue*, 48 U. CHI. L. REV. 201 (1981); Nathanson, *Report to the Select Committee on Ex-Parte Communications in Informal Rulemaking Proceedings*, 30 ADMIN. L. REV. 377 (1978); Preston, *A Right of Rebuttal in Informal Rulemaking: May Courts Impose Procedures to Ensure Rebuttal of Ex-Parte Communications and Information Derived from Agency Files After Vermont Yankee?*, 32 ADMIN. L. REV. 621 (1980); Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 228-30 (1978) (cutting off the flow of informal information would frustrate effective decision-making); Note, *Ex-Parte Communications During Informal Rulemaking*, 14 COLUM. J.L. & SOC. PROBS. 269 (1979); Note, *Due Process and Ex-Parte Contacts in Informal Rulemaking*, 89 YALE L.J. 94 (1979).

[219] Recommendation 77-3 of the ACUS, 1 C.F.R. § 305.77-3 (1983) (general prohibition on ex-parte contact in informal rulemaking would be unwise).

> Where agency action resembles judicial action, where it involves formal rulemaking, adjudication, or quasi-adjudication among "conflicting private claims to a valuable privilege," the insulation of the decision-maker from ex-parte contacts is justified by basic notions of due process to the parties involved. But where agency action involves informal rulemaking of a policymaking sort, the concept of ex-parte contacts is of more questionable utility.
>
> . . . .
>
> Later decisions of this court . . . have declined to apply *Home Box Office* to informal rulemaking of the general policy making sort involved here, and there is no precedent for applying it to the procedures found in the Clean Air Act Amendments of 1977.[221]

Other cases have permitted agency ex-parte contact during the development of NPRM's.[222] Courts have also permitted agencies to use outside assistance during the deliberative phases of rulemaking after the record is closed. In *United Steelworkers of America v. Marshall*,[223] the union challenged OSHA's reliance on outside consultants analyzing the rulemaking record and helping to prepare the preamble to the final rule. The consultants participated in the rulemaking proceeding and submitted material for the record. As part of their deliberative assistance, the consultants prepared additional reports which were submitted to OSHA but not incorporated into the record. The District of Columbia Circuit rejected the union's argument that these were impermissible ex-parte communications.[224]

It is reasonably safe to offer the following conclusions about ex-parte contact in the context of negotiated rulemaking:[225]

> 1. The rule ultimately adopted by the agency must be supported by factual information contained in the official record. There is no reason that the negotiators cannot discuss and even agree upon factual information to be put in the record.
>
> 2. Persons with an interest in the content of the rule must be afforded an opportunity to know the factual basis for the rule and to challenge facts submitted by opponents in an appropriate adversarial context. This may be pro-

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[220] 657 F.2d 298 (D.C. Cir. 1981).

[221] *Id.* at 400, 402.

[222] *See* Home Box Office, Inc. v. FCC, 567 F.2d 9, 57 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1978) (implying that ex-parte contact is limited only *after* NPRM is published); Iowa State Commerce Comm'n v. Office of Fed. Inspector, 730 F.2d 1566, 1576 (D.C. Cir. 1984).

[223] 647 F.2d 1189 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981).

[224] *Id.* at 1220 (quoting Lead Indus. Ass'n v. OSHA, 610 F.2d 70 (2d Cir. 1979)) (finding consultant reports to be within Exemption 5 of the Freedom of Information Act).

[225] For a slightly different proposal, *see Rethinking Regulation*, *supra* note 165, at 1888-89.

> vided by an opportunity to participate in the negotiations or by an opportunity to comment as part of the notice-and-comment process.
> 3. If the negotiation takes place among appropriately balanced interest representatives, the opportunity for adversarial exploration of policy and factual issues is preserved in the negotiation itself.[226]
> 4. Consultation between the agency and the negotiation participants after the "record" is closed should be permissible so long as such consultation focuses on policy, rather than new factual, matters.
> 5. Placing summaries of discussions in the "record" so that non-parties to the discussions can know of their substance and have an opportunity to respond, while not necessary in every case, enhances the likelihood that the *ex-parte* contact will be found permissible by a court.[227]

### G. *Judicial Review Under the Arbitrary and Capricious Standard*

Section 706 of the APA[228] provides that a court may overturn an agency rule if it finds that the agency's action in promulgating the rule was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[229] It is common for substantive statutes authorizing agencies to make rules including similar standards for judicial review, or incorporating the APA standard by reference.[230] Moreover, some commentators have suggested that because Congress cannot delegate authority to act arbitrarily and capriciously, an arbitrary and capricious standard of judicial review would be a constitutional minimum.[231]

The Supreme Court has recently restated what "arbitrary and capricious" means:

> Normally, an agency rule would be arbitrary and capricious if the agency has

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[226] *See id.* at 1887-89 (suggesting that the ex-parte problem could be avoided in negotiated rulemaking by judicial review limited to the questions of whether the party claiming harm was represented adequately in negotiations).

[227] *See* Carlin Communications, Inc. v. FCC, 749 F.2d 113, 118 n.9 (2d Cir. 1984) (no violation of agency rules or general principles of administrative law where exparte contacts are summarized in record of notice and comment rulemaking).

[228] 5 U.S.C. § 706 (1982).

[229] *Id.* § 706(2)(A). *See also ABA Restatement, supra* note 186, at 235-37.

[230] *See, e.g.*, National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1392(b) (1982); Occupational Safety and Health Act, 29 U.S.C. § 655 (1982) (impliedly subjecting rules to APA, while imposing additional requirement that agency determinations in rulemaking must be supported by "substantial evidence in the record taken as a whole").

[231] *See* JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 359, 375 (1965) (presence of discretion should not bar court from considering claim of illegal or arbitrary use of discretion); Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55 (1965) (APA section 701(a)(1) excepts lawful exercise of discretion from judicial review; abuses of discretion may be corrected judicially). *Cf.* BATOR, MISHKIN, SHAPIRO & WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 330-75 (3d ed. 1973) (considering constitutionality of statutory preclusion of judicial review).

> [1] relied on factors which Congress has not intended it to consider, [2] entirely failed to consider an important aspect of the problem, [3] offered an explanation for its decision that runs counter to the evidence before the agency, or [4] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[232]

While agencies have considerable latitude in the exercise of their discretion, "an agency must cogently explain why it has exercised its discretion in a given manner."[233] Agency explanation takes on added importance because "an agency's action must be upheld, if at all, on the basis articulated by the agency itself."[234]

Uncertainty about facts may permit agencies to choose a course of action based on policy judgments, but they must explain their decisions "from the facts and probabilities on the record to a policy conclusion."[235] Agencies cannot merely recite the term "substantial uncertainty" as a justification for their actions.[236]

The Supreme Court's *Vermont Yankee* decision[237] does not dilute the arbitrary and capricious standard; *Vermont Yankee* merely requires courts to scrutinize the record support for an agency rule under the arbitrary and capricious standard instead of imposing particular procedures. Negotiated rulemaking, as a procedural innovation, is entirely consistent with the spirit of *Vermont Yankee*, but the rule resulting from negotiations must nevertheless pass muster under the arbitrary and capricious standard of judicial review.

Consequently, a rule promulgated solely because it is agreed upon in negotiations among affected parties might be vulnerable to attack as being arbitrary and capricious,[238] unless the agency offers its own rationale and support for the content of the rule.[239] Part of this rationale can be the fact that affected interests reached agreement in negotiations. Because rationality requires a nexus between the rule and its factual support,[240] the agency rationale also needs to demonstrate factual support in a "record" developed in the rulemaking proceeding. While a detailed record of the negotiations could chill negotiation, there is no reason why negotiators should not discuss what should be disclosed in the record to support their consensus proposal, and what the agency should say in its rationale.

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[232] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). The *Motor Vehicle Manufacturers* case broke new ground applying the arbitrary and capricious standard to rescind a rule, but it did nothing new or controversial with respect to the meaning of the standard itself.

[233] *Id.* at 48.

[234] *Id.* at 50. *See also* Industrial Union Dep't. v. Am. Petroleum Inst., 448 U.S. 607, 631 n.31 (1980).

[235] *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 52.

[236] *Id.*

[237] Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978).

[238] *See* Stewart, *supra* note 17, at 1799-1800 (no logical reason exists to preserve current concepts of judicial review if rulemaking is a political process with adequate representation of affected interests, but courts are still unlikely to change their approach); Wald, *supra* note 167, at 1 (expressing wariness of requiring courts to consider adequacy of representation and opining that judicial review of negotiated rules will not change much); *Rethinking Regulation*, *supra* note 165, at 1885-87 (suggesting that the use of negotiation ought to relax judicial review standards).

[239] The FAA justification for the negotiated flight-and-duty-time rule and EPA's justification for the nonconformance penalty [hereinafter NCP] rule are good examples.

Even if the agency's articulated rationale is flawed,[241] it is appropriate for a reviewing court to consider whether the negotiating procedure sufficiently guaranteed that the agency considered all the relevant factors.[242] If the rule reflects a consensus of the affected parties, this goes a long way toward meeting the goals of *Citizens to Preserve Overton Park, Inc. v. Volpe*[243] and ensures that the rule is neither arbitrary nor capricious.[244]

If the negotiated rulemaking procedure supports an agency decision that would otherwise be vulnerable to attack under the arbitrary and capricious standard, the reviewing court must assure itself that the negotiation procedure adequately ensured the participation of all affected interests. Review of the procedure would include the following:

> 1. Reviewing the notice of intent to establish a rule negotiation to ensure that it adequately informed the public what issues would be considered so that all interests ultimately affected could know that their interests would be involved in the negotiation.[245]
> 2. Reviewing the merits of the consensus developed in the negotiations only if the challenger can demonstrate that its interests were not adequately represented in the negotiation and that it made a reasonable effort to participate in response to the original notice of negotiation.[246]
> 3. Reviewing the rule itself to determine if it is within the agency's authority,[247] and if it reflects all the factors required by statute to be considered.[248]

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[240] Statutory requirements for support in the record for a rule contained in substantive statutes, reinforce the need to give attention to the record support for a negotiated rule.

[241] The agency's contemporaneous rationale must support the rule. *See ABA Restatement*, *supra* note 186, at 265. The agency's reasoning must also be logical. *Id.* at 255, 259.

[242] Consideration of all relevant factors is one requirement of the arbitrary and capricious standard. *See id.* at 250-51.

[243] 401 U.S. 402 (1971).

[244] Harter, *supra* note 29, at 106-07 (discussing judicial review).

[245] *Id.*

[246] *Id.*

[247] Use of negotiated rulemaking obviously cannot expand an agency's authority beyond what was delegated to it by the Congress. *See ABA Restatement*, *supra* note 186, at 268 (independent judgment by the court would be appropriate to determine whether agency adhered to limits and conditions of delegation, whereas more lenient standards of judicial review would be appropriate for other questions).

[248] *See id.* at 250-51. Determining that the agency has complied with congressio-

> In this part of the review it is appropriate to permit agency action within a wide ambit of reasonableness,[249] since an adequate negotiation process ensures that the agency has taken a "hard look" at relevant factors and considered alternatives.[250]

The same things that negotiators and sponsoring agencies should do to avoid delegation and ex-parte communication problems will also reduce the likelihood of a court declaring a negotiated rule to be arbitrary and capricious.

### *H. Federal Advisory Committee Act Problems*

FACA[251] presents a serious threat to the effectiveness of negotiated rulemaking. A strict interpretation of the Act requires that regulatory negotiation sessions be open to the public. Such an interpretation, if applied by agencies or insisted upon by the courts, could inhibit interested parties from candidly exploring compromises.[252] Furthermore, requirements for a charter, General Services Administration (GSA) approval, advance notice of meetings, or for minutes slow the negotiation process down.

Open meetings discourage individual participants from making concessions. If representatives fear constituency reaction to tentative concessions, they will make concessions grudgingly. Such reluctance to move from initial postures hampers fruitful negotiations.[253]

The effect of FACA concerned everyone in the completed negotiations. Compliance with the open meeting requirement, however, created few problems in the FAA or EPA negotiations. Agencies, including OSHA, generally followed the spirit of Paragraph twelve of ACUS Recommendation 82-4, closing sessions only as necessary to protect confidential data, or to protect the deliberative process. Some participants and agency personnel believed the open meetings permitted challenges to the negotiating process to be deflected more successfully than if the meetings had been closed. In the benzene negotiations, efforts to avoid FACA requirements distorted the negotia-

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nally mandated criteria is closely related to determining that the agency has not exceeded its authority. *Id.* at 251. The congressional mandate is not subject to change by the particular process used by the agency.

[249] *See id.* at 253-56 (cautioning that judicial review should allow the agency broad discretion, once the court has determined that there has been compliance with statutory mandate).

[250] The "hard look" approach is one application of the arbitrary and capricious standard, forcing careful agency examination of alternatives and a complete rationale in support of those alternatives selected. *See id.* at 259 (characterizing "hard look" line of cases).

[251] 5 U.S.C. app. §§ 1-15 (1982).

[252] The FACA problem is evaluated in considerably more detail in *Evaluation of Recommendations*, *supra* note 5, at 1703-07.

[253] These concerns led ACUS to recommend congressional action to relax FACA requirements for negotiated rulemaking. *See* paragraph 2, ACUS Recommendation 82-4, 1 C.F.R. § 305.82-4 ¶ 2 (1986).

tion process, primarily by foreclosing active agency participation.[254]

There are two reasons for the difference between expectations and experience. The first reason is that more sensitive exploration of concessions almost always takes place away from the formal negotiating table and outside formal meetings of the negotiating group. Therefore, the potential for harm from public scrutiny was obviated where the threat was greatest.

The second reason is that no one from the press or the nonparticipant public made much of an issue of caucuses or subgroup meetings being closed, nor did the negotiations result in much publicity. If regulatory negotiation becomes more commonplace and is utilized in highly controversial issues, press or public interest representatives will probably become more aggressive in reporting on negotiations and in insisting that FACA be observed rigorously. Such a trend could result in greater FACA impediments to the negotiations process. On the other hand, practical ways of conducting business away from public meetings will almost certainly continue to be found.

### *I. Class Action Settlement Negotiation*

A parallel framework for rulemaking negotiation exists relatively independently of the APA. When a class action lawsuit against an administrative agency decision is filed, the Federal Rules of Civil Procedure help accomplish the goals of negotiated rulemaking. The Federal Rules of Civil Procedure encourage judges to promote negotiation and settlement of disputes.[255] Circuit Judge Patricia M. Wald noted[256] that there is ample authority in the Federal Rules of Civil Procedure for judges to expand their role in encouraging settlements in appropriate cases.[257] District judges are more likely than circuit judges to play this role.[258]

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[254] *See Evaluation of Recommendations*, *supra* note 5, at 1660, 1664-66.

[255] FED. R. CIV. P. 16. Subsection (a) of this rule states:

> In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as (1) expediting the disposition of the action; (2) establishing early and continuing control so that the case will not be protracted because of lack of management; (3) discouraging wasteful pretrial activities; (4) improving the quality of the trial through more thorough preparation, and; (5) facilitating the settlement of the case.

The advisory committee notes to Federal Rule 16 encourage active judicial pretrial management. *Id.*

[256] Wald, *supra* note 167, at 1.

[257] *Id.*

[258] Judge Wald states:

There are, however, several reasons why negotiations within the class action framework are much less satisfactory than negotiated rulemaking under the ACUS recommendations. The class action approach, for instance, requires that a lawsuit be filed, and that the plaintiffs or intervenors in the lawsuit represent a sufficiently broad range of interests for a negotiated settlement to be fair and successful. Moreover, while recent amendments to Rule sixteen of the Federal Rules of Civil Procedure permit federal judges to consider negotiations within a class action framework, there is no guarantee that a particular judge would be sympathetic to the process.

For rule negotiation in a class action to be fair, it is necessary that all interested parties be formal "parties" to the lawsuit.[259] In some instances, such as *Costle*'[260] interested groups who were not initially party to the action will intervene.[261] In other instances, when the parties do not intervene, the district court could take an active role in bringing all interested parties together. To accomplish this, the court could use Federal Rules nineteen and twenty-three. Federal Rule nineteen provides that parties who have such an interest in the litigation must be joined in the action. Specifically, the rule states that a party shall be joined in the action if relief cannot be granted in his absence or if he claims an interest in the action and is so situated that the disposition of the action may as a practical matter impair his ability to protect that interest.[262] *Costle* acknowledges that when a set-

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> [T]he district courts have at their disposal both proven and unexplored techniques for promoting negotiation and settlement. The appellate courts, by contrast, have far fewer tools. Direct appeals from EPA orders and rules are, of course, most often brought in the circuit court of appeal, not the district courts. But very few courts of appeal, including my own, admit to any responsibility for promoting settlement.

*Id.* at 15.

The pre-argument conference procedure utilized by the Second Circuit Court of Appeals may be an exception. The author of this article has participated in several such conferences and knows that the encouragement to negotiate a settlement of the appeal can be impressive.

[259] One of the problems in negotiating a rule is the possibility that an interested party will simply boycott the negotiations and later obtain judicial review of the decision. Mr. Harter suggests a novel solution to this problem: require a less stringent standard of review for negotiated rules. Harter, *supra* note 29, at 102-03.

[260] *See supra* notes 31-38 and accompanying text.

[261] A party's right to intervene in an action is governed by FED. R. CIV. P. 24.

[262] Subsection (a) of Federal Rule 19 provides:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses

tlement involves a rule, those persons who would be affected by this rule are entitled to a notice-and-comment hearing.[263] It follows that these parties could also be joined in the negotiations through Federal Rule nineteen by the district court.[264]

### J. *Representation Issues*

The APA does not address representation problems that may arise in selecting participants for negotiated rulemaking. Of course, there are models that could be borrowed from the Labor Management Relations Act,[265] the Railway Labor Act,[266] or from the class certification procedures under the Federal Rules of Civil Procedure.[267] These models suggest the issues which should be addressed when large numbers of persons or entities are to be represented in negotiations: 1) whether the representative shall be the exclusive representative of the constituency; 2) if representation is to be exclusive, how the unit to be represented shall be defined; 3) how frequently the unit can be redefined and an election held for a new representative; and 4) what duties the representative has in representing its constituents fairly.

Despite the intellectual utility of the labor law or class action models, important differences exist between representation problems in negotiated rulemaking and in collective bargaining or class action liti-

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> to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

*Id.* 19(a).

[263] Environmental Defense Fund, Inc. v. Costle, 636 F.2d 1229, 1255 (D.C. Cir. 1980).

[264] In *Costle*, the court held that the settlement between the EPA and NRDC did not involve a rule but merely established preliminary investigations as a first step toward determining whether to promulgate a rule. Because this was not a rule, the court denied the motion to vacate the settlement agreement.

While the companies may not have been entitled to a notice-and-comment hearing because this was not strict rulemaking, they probably had a sufficient interest in the negotiations to be properly joined by the district court. Specifically, the court could have found that their absence would, as a practical matter, impair their ability to protect their interests since rules may issue from these investigatory procedures which the EPA and NRDC established. Alternatively, if the proposed modification did relate to a rule, then the companies' presence in negotiations under the district court's supervision would be adequate.

[265] *See* 29 U.S.C. § 159 (1984) (providing for elections to select exclusive representation for an appropriate unit of employees).

[266] *See* 45 U.S.C. § 152 (1984) (providing for elections to select exclusive representation for employees in a particular class or craft).

[267] FED. R. CIV. P. 23.

gation. First, interests affected by agency rules often already have some representation arrangements through trade associations, trade unions, or public interest groups. These arrangements are determined by the constitutions or bylaws of the private association, by powers of attorney given in specific cases, or by tradition. In the majority of negotiated rulemaking proceedings these arrangements can be expected to work well, and there is no need to superimpose another process to designate representatives.

Second, many rule negotiations do not envision long-term relations among the parties like collective bargaining.[268] In this respect, the similarity is greater between negotiated rulemaking and class action litigation than between negotiated rulemaking and collective bargaining.

Third, erecting a formal statutory mechanism to select representatives for rule negotiations could cause more harm than good by creating additional opportunities and incentives to litigate compliance with the representation procedures.

Recognizing that representation should be addressed in the context of specific negotiations, ACUS simply recommended that agencies be mindful of representation issues, and be creative in finding ways to solve anticipated representation problems.[269] Agencies might, of course, wish to use the labor law or class action procedures as rough models to define options for approaching negotiated rulemaking representation disputes, possibly even holding "elections" through the notice-and-comment procedure.

The representation issues discussed in the preceding paragraphs are vertical, involving relations between representative and constituents. Horizontal relationships, between representative and representative, should also influence the designation of representatives for rule negotiation. ACUS Recommendation 305.82-4 identified two characteristics of the relationship among representatives that would increase the likelihood of a negotiated agreement: countervailing power[270] and a limited number of parties.[271] Negotiation can be effective only if no one party has sufficient power to overwhelm the others.[272] Increased power on one side does, however, strengthen incentives for opposing sides to seek a negotiated solution. Each party must have the power to affect the decisional outcome through either the capacity to influence the legislature, the ability to run an effective public relations campaign, substantial litigation resources, or some other way of obtaining a favorable outcome or inflicting costs on opponents.

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[268] To a certain extent, however, the same interest group representatives deal with one another repeatedly in rulemaking proceedings before the same agency.

[269] *See* ACUS, 1 C.F.R. § 305.85-5 ¶ 7 (1986).

[270] *Id.* § 305.25-4 ¶ 4. This corresponds to paragraph 4(e) of ACUS Recommendation 82-4, *id.* § 305.82-4 ¶ 4(e).

[271] *Id.* § 305.25-4 ¶ 5. This corresponds to paragraph 4(c) of ACUS Recommendation 82-4, *id.* § 305.82-4 ¶ 4(c).

[272] For example, negotiation would not effectively resolve a conflict between a power company which seeks to build a dam, town residents which support the power company, and a small group of environmentalists which oppose the dam. The environmentalists would bring little power to the table. If the dispute resolution was carried

There was little controversy over who should participate in the negotiations in the completed rule negotiations. In all of the initiatives except the one involving benzene, the agencies published lists of proposed participants, permitting excluded interests to make a showing as to why they should be included in the negotiating group.[273] Agencies experienced no difficulties with this approach to representation and inclusion/exclusion issues. One could infer, however, that the benzene negotiations would have proved less difficult if some nonparticipating labor unions could have been more involved instead of objecting to various aspects from the sidelines.[274] In other words, the representation problem in the benzene negotiation was not the exclusion of interests wishing to participate, but rather a more subtle one of failing to identify and include everyone who had the incentive and the power to block a negotiated resolution. The process of identifying participants in the FAA negotiation focused on potential intraconstituency disagreements within the major airline industry association, creating an incentive for the association to address such disagreements.

Some participants in EPA negotiations, particularly environmental groups, may have found negotiation processes more attractive than the participants in the OSHA or FAA negotiations because they believed they wielded relatively little influence over the agency notice-and-comment or hybrid rulemaking. The negotiation process enhanced their perceived influence with the agency. Conversely, organized labor has long enjoyed substantial informal influence with Labor Department agencies. Therefore, negotiations threaten to weaken Labor's relative power advantage. The airlines and pilot organizations have comparable power to affect FAA policy, but each side perceived its opponent as having substantially equal power.

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out in a courtroom or a congressional committee, on the other hand, the environmentalists would have the advantage of procedural safeguards. The presence of these safeguards would ensure the protection of their interests—provided they have sufficient funds or political clout and sophistication.

[273] This approach is recommended by paragraph 7 of ACUS Recommendation, 1 C.F.R. § 305.82-4 ¶ 7 (1986).

[274] *Evaluation of Recommendations*, *supra* note 5, at 1654-64.

The decision to include a particular party is made according to the same criterion which determines whose consent to the negotiating result is vital. Thus, if X, by litigating or inducing OMB or the Congress to intervene, is unlikely to be able to affect the result, there is no need to include X in the negotiations. Nor is it important whether X, having been included, agrees with the negotiation result. On the other hand, if X is likely to be able to affect the result significantly, there are stronger incentives to include X and to ensure that X agrees with the result of the negotiation.

Representation should be addressed through an initial Federal Register notice, providing an opportunity for additional parties to request participation. The approach followed by the FAA and EPA worked well, and has been adopted in subsequent rule negotiations.[275] The agency sponsoring negotiated rulemaking should publish an initial list of participating interests and representatives, allowing comment and requests for additional participation.

## VII. STATE PROCESS

### A. *Often Ignored*

A final comment is appropriate on the use of negotiated rulemaking at the state level. Most states have far fewer resources for the administrative process than the federal government. Accordingly, administrative litigation before state agencies is not as complex as it is before federal agencies. Indeed, a measure of informal negotiation between affected interests is a regular feature of the state process. Additionally, a number of states have adopted procedures to permit legislative veto or advice on specific rules proposed by agencies. Legislative participation in the rulemaking process facilitates negotiation among affected interests.

### B. *Model State APA*

The Model State Administrative Procedure Act[276] recognizes the appropriateness of administrative ADR. Its rulemaking provisions explicitly provide for informal consultation before publication or notice of proposed rulemaking[277] and for appointment of committees to comment before publication of a notice of proposed rulemaking.[278]

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[275] *See* 50 Fed. Reg. 42,789 (1985) (involving MDA); 51 Fed. Reg. 5,205 (1985) (involving FTC).

[276] MODEL STATE ADMINISTRATIVE PROCEDURE ACT (Uniform Law Commissioners 1981) *reprinted in* 14 UNIFORM LAWS ANNOTATED 357 (master ed. 1980 & Supp. 1987) [hereinafter MODEL ACT]. The National Conference of Commissioners on Uniform State Laws adopted the first model state administrative procedure act in 1946. Approximately half the states have adopted parts of the model act. *Id.* at 359.

[277] *Id.* § 3-101(a).

[278] *Id.* § 3-101(b).

The Act also allows more flexibility for adjudicatory procedure than the federal APA's single formal adjudication procedure.[279] It explicitly contemplates four types of adjudicatory proceedings: formal adjudicative hearings,[280] including a provision for a pre-hearing conference at which settlement could be discussed,[281] conference adjudicative hearings,[282] emergency adjudicative proceedings,[283] and summary adjudicative proceedings.[284]

A conference adjudicative hearing is applied to cases involving monetary amounts less than $1,000, prisoner disciplinary proceedings not involving expulsion or discharge, and license disciplinary actions not involving revocation.[285] The procedure eliminates discovery and only permits the parties to present evidence.[286]

A summary procedure is applicable only when a rule has been adopted by the agency,[287] and when the judgments involve only reprimands or monetary amounts less than $100.[288] The procedure requires notice to the party of the action contemplated and permits the party to comment on the proposed action.[289]

The Model State Administrative Procedure Act does not address arbitration, and state case law raises questions about the consistency of arbitral resolution of public law disputes with the nondelegation doctrine.[290]

### C. *New Jersey, Tennessee, and Minnesota Experiences*

At the American Bar Association annual meeting in New York, in August, 1986, the Dispute Resolution Committee of the Section on Administrative Law presented a program on negotiated rulemaking as an alternative dispute resolution technique. The author was the program organizer and moderator.[291] The panel reviewed the federal agency initiatives with negotiation of rules analyzed in this article, and considered their use at the state level. Experience with negotiated rulemaking as a separately defined decision-making process has been limited at the state level. It is common, however, for state agencies to meet informally with affected groups to develop rules. Such informal interaction occurs more often through bilateral contact between the agency and a single representative in preparing a proposal than with all parties simultaneously. Some states, notably New Jersey, send a pre-proposal notice to affected interests. In Minnesota, agencies have an incentive to come to agreement on proposed rules with affected interests to avoid the necessity of a formal hearing which would be held by the independent office of administrative law judges. This office charges an hourly fee to the agency for Administrative Law Judge (ALJ) services, and the ALJ has veto power over the agency's proposed rule.

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[279] *Compare id.* §§ 4-101 to 4-221 *with* 5 U.S.C. §§ 554, 556-557 (1982).

[280] MODEL ACT, supra note 276, at §§ 4-201 to 4-221.

[281] *Id.* § 4-204 comment.

[282] *Id.* §§ 4-401 to 4-403.

[283] *Id.* § 4-501.

[284] *Id.* § 4-502.

[285] *Id.* § 4-401(2).

[286] *Id.* § 4-402.

[287] In other words, the agency may not use the summary procedure to make policy. *Cf.* NLRB v. Bell Aerospace Co. Div. of Textron, 416 U.S. 267 (1974) (approving the National Labor Relations Board [hereinafter NLRB] making rules in individual case adjudication).

[288] MODEL ACT, *supra* note 276, at § 4-502(3).

[289] *Id.* § 4-503.

[290] *Id.*

The participants agreed that the further use of negotiated rulemaking at the state level depends upon all parties (including the agency) having a clear incentive to negotiate a consensus rather than following the usual formal process.[292]

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[291] Panel members were Philip J. Harter, Chairman of the Dispute Resolution Committee; Chris Kirtz, Director of Policy for the United States Environmental Protection Agency; Duane Harves, Chief Administrative Law Judge of the state of Minnesota; Steven LeFelt, Deputy Director of the New Jersey Office of Administrative Law; William Penny, Assistant Commissioner and General Counsel of the Tennessee Department of Environment; and Warren Kaplan, law student liaison.

[292] The panel also discussed the use of alternative dispute resolution techniques in adjudication (resolution of "contested" cases). Although significant resistance to governmental bodies submitting to arbitration continues to be common, the represented states have been energetic in trying to use settlement conferences and other forms of informal resolution to a greater extent.

# USE OF NEGOTIATED RULEMAKING TO DEVELOP A PROPOSED OSHA HEALTH STANDARD FOR MDA

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Prepared May, 1988
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# Table of Contents

I. INTRODUCTION ........ 1
  A. Overview ........ 1
  B. Scope of Investigation ........ 2
II. BACKGROUND ........ 3
  A. Negotiated Rulemaking ........ 3
  B. Legal Framework for Negotiated Rulemaking ........ 6
  C. Background of MDA Negotiation ........ 10
  D. Why MDA Was Suitable for Negotiated Rulemaking under the ACUS Criteria ........ 10
  E. Intellectual Capital for the Negotiation ........ 13
III. CHARACTERISTICS OF MDA COMMITTEE PROCESS ........ 14
  A. Committee Membership ........ 14
  B. Workload and Time Commitment ........ 16
  C. Intra-constituency Disagreements ........ 17
  D. Agency Representation ........ 18
  E. Administrative Support ........ 21
  F. Departmental Involvement ........ 22
  G. OMB Involvement ........ 23
  H. Mediation ........ 24
IV. OSHA PREPARATION FOR MEETINGS AND TECHNICAL SUPPORT ........ 25
V. FEDERAL ADVISORY COMMITTEE ACT ........ 26
VI. DEVELOPMENT OF CONSENSUS AND POST-CONSENSUS PROCESS ........ 26
  A. The Consensus Groundrule ........ 26
  B. Development of Consensus ........ 28
  C. Committee Procedures Promoting and Retarding Consensus Development ........ 28
    1. Drafting ........ 28
    2. Subgroups ........ 29
  D. Post Consensus Process ........ 29
VII. EVALUATION AND CONCLUSIONS ........ 30
  A. The OSHA Support Problem: Tension Between Ad-Hoc Demands of MDA Negotiation and Orderly Management of OSHA Organization ........ 31
  B. Costs and Benefits of Negotiated Rulemaking ........ 32
    1. Benefits ........ 32
    2. Costs ........ 33

VIII. RECOMMENDATIONS....33
IX. INSTITUTIONALIZING NEGOTIATED RULEMAKING....38
  A. The Need for Departmental Assistance....38
  B. Proposed Pilot Program....39
    1. Summary....39
    2. Functions....39

## I. INTRODUCTION

### A. *Overview*

The Occupational Safety and Health Administration ("OSHA") successfully used a process called negotiated rulemaking[1] to develop a proposed health standard for 4,4'-methylenedianiline ("MDA"), a chemical used in producing polyurethane foams and elastomers, and a suspected carcinogen.

Negotiations on the MDA standard began in July, 1986 and proceeded until a consensus was reached in May, 1987.[2] As one participant put it, it is too early to tell if the negotiation approach was "successful." The negotiation committee developed a *proposed* standard. Success depends on a reduction of controversy at any hearing on the proposal and on a reduction of post final-rule litigation. By this test, the negotiation cannot be evaluated fully for many months or years.

Because of the importance of negotiated rulemaking as an alternative to adversarial hybrid rulemaking procedures, the Office of the Assistant Secretary for Policy of the Department of Labor commissioned the author, as part of his effort to assist the Assistant Secretary on DOL regulatory improvement generally, to review the MDA negotiation as to develop recommendations.

This report presents the results of that review and concludes that OSHA has proven its ability to utilize negotiated rulemaking, that OSHA participation in the MDA negotiation was essential, that the MDA committee demonstrated commitment, and creativity, especially in framing a workable consensus rule, but that conflict between orderly management of OSHA and the ad-hoc nature of negotiated rulemaking suggests action at the Departmental level to institutionalize negotiated rulemaking as an alternative rulemaking process for all DOL agencies, including OSHA. It also presents the following specific recommendations:

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[1] The process also is known as "mediated rulemaking".

[2] 50 Fed. Reg. 42787, 42789 (Oct. 22, 1985) (establishing Negotiated Rulemaking Advisory Committee on MDA to "advise the Secretary of Labor regarding the building of consensus by affected interests on issues associated with a proposed OSHA standard on MDA; plans for MDA rule negotiation, proposing committee procedures, and identifying 13 issues to be addressed); 50 Fed. Reg. 44337 (Oct. 29, 1985) (regulatory agenda proposing schedule for negotiated rulemaking to result in NPRM by March, 1986); 50 Fed. Reg. 48655 (Nov. 26, 1985) (extension of time for submitting comments and requests for membership on negotiation committee); 51 Fed. Reg. 6748 (Feb. 26, 1986) (responding to EPA notice of July 5, 1986, 50 Fed. Reg. 27674, and announcing consideration of negotiated rulemaking to develop standard); 51 Fed. Reg. 14202 (Apr. 21, 1986) (regulatory agenda announcing plans for mediated rulemaking, with NPRM scheduled for October, 1986 and final action by December, 1987); complete action by December 27, 1986); 51 Fed. Reg. 24452 (Jul. 3, 1986) (appointing members of negotiating committee and announcing first meeting for July 22-24, 1986; stating that oral presentations by members of the public will be permitted under control of the Mediator/Chairman; relaxing requirement for verbatim transcript and providing for detailed minutes instead, and modifying quorum requirements so that two members representing employers and two representing management must be present to conduct business); 51 Fed. Reg. 27919 (Aug. 4, 1986) (announcing meetings and topics: August 5, 1986, scope and application, definitions, recordkeeping, emergencies, hygiene facilities and housekeeping; September 9, 1986, personal protective equipment, exposure monitoring, and site visit; October 7, 1986, health effects, risk assessment, medical surveillance, medical appendices, biological monitoring, and removal and rate retention; November 16, 1986, technological and economic feasibility; December 9, 1986, permissible exposure limits, including short term exposure limits and action level discussions; and January 13, 1987, review of committee recommendations for Federal Register publication); 51 Fed. Reg. 35571 (Oct. 6, 1986) (announcing location changes for meetings for October 7, 1986, November 18, 1986, December 9, 1986, and January 13, 1987); 51 Fed. Reg. 36876 (Oct. 16, 1986) (renewing negotiating committee and changing name to "Mediated Rulemaking Advisory Committee"); 52 Fed.Reg. 17648-02 (May 11, 1987) (notice of May 18-21 meeting of MDA Committee for review and edit of final recommendations to OSHA); 52 Fed.Reg. 26776 (July 16, 1987) (committee's consensus standard).

1. The MDA process for defining representation of affected interests should be used as a model.
2. The agency representative on a negotiated rulemaking committee should be committed, energetic and creative.
3. Committee members should have commitment.
4. A system of committee alternates should be considered.
5. Future rule negotiations should provide for mediation.
6. The MDA Committee protocol is a good checklist for other committees but should not be imposed by sponsoring agencies or followed rigidly by committees.
7. Negotiating committee resources should be managed more effectively, and the sponsoring agency must commit adequate resources at the outset of the negotiation.
8. Agency preparation for negotiating committee sessions should be improved.
9. A significant portion of committee meetings should be held away from Washington, and away from the Department of Labor.
10. Facility tours for committee members are desirable.
11. Subgroups should be considered and utilized to the extent, and when, the committee decides.
12. A source of technical analysis must exist.
13. Minutes of meetings should be provided.
14. A microcomputer should be made available to negotiation committees.
15. Agencies should consider distributing committee materials in electronic form.
16. The post consensus process anticipated for the MDA consensus recommendation is a good model for other rule negotiations.

### B. *Scope of Investigation*

This report was written after the MDA Committee had reached consensus on the draft of an NPRM, but before OSHA had published an NPRM and received comments. At this juncture, it was premature to expose — and possibly to exaggerate — disagreements and compromises on the content of an MDA standard. Such exposure could affect the ongoing development of an MDA standard adversely. Accordingly, the author and the Department of Labor agreed that the focus of this report would be on the MDA committee process exclusively; not the content of the standard or the views of the committee members or OSHA on that content.

These are the major questions relating the MDA' negotiated rulemaking investigated by the author and addressed in this report:

1. What characteristics of MDA made it a suitable or unsuitable candidate for negotiated rulemaking?
2. Was the membership of the negotiating committee defined appropriately?
3. Was OSHA representation on the negotiating committee handled appropriately?
4. Was an outside mediator necessary?

5. What aspects of the committee's operating procedures enhanced or detracted from effective committee functioning?
6. Were OSHA, DOL, OMB concerns communicated to the committee in an appropriate fashion?
7. Was negotiated rulemaking worth the effort, or would traditional processes have produced an equally satisfactory result at lower cost to OSHA and the participants?
8. Were Federal Advisory Committee Act requirements handled appropriately?
9. What changes in OSHA or departmental procedures for negotiated rulemaking are suggested by the MDA experience?
10. How can the Department of Labor institutionalize negotiated rulemaking as an alternative to more confrontational rule development procedures?

This author attended MDA negotiating sessions and met informally with most of the participants. After consensus was reached, the author interviewed all participants who made themselves available.

At the request of OSHA, the mediator appointed a subcommittee of the negotiating committee to review the MDA negotiation as a basis for an OSHA self evaluation of the process. The subcommittee developed a report for the Assistant Secretary for Occupational Safety and Health. The OSHA self evaluation is entirely independent of this report.

## II. BACKGROUND

### A. *Negotiated Rulemaking*

Negotiated rulemaking[3] is a process for resolving interest disputes over administrative agency rules, similar in many ways to the legislative process. Negotiated rulemaking also is similar, as one of the MDA participants pointed out, to the project or problem team concept frequently used in industry. "The concept is essentially to get a group of capable people focussed on and working toward a specific goal as opposed to their ongoing functional roles. The secret to success is to include factions in the team that are potential antagonists and try to resolve their differences at a peer level."[4] To some people, use of the term "negotiation" is alarming because it suggests a cynical trade-off of health and safety concerns for economics. To them, the term "mediation" is preferable.[5] Mediation and negotiation are distinct concepts in dispute resolution,[6] and to avoid confusion, this report uses the term "negotiation" to refer to the process of trying to resolve differences at the peer level.

Negotiated rulemaking emerged as a distinct administrative law concept in the late 1970's as a reaction to the unsuitability of notice-and-comment and hybrid rulemaking processes for making quasi-legislative administrative agency decisions. Initially advocated by Secretary of Labor John T. Dunlop,[7] negotiated rulemaking eventually was embraced by the Administrative Conference of the United States as a worthwhile alternative to hybrid rulemaking. ACUS Recommendation 82-4, concluded:

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[3] "Regulatory negotiation" is a term that refers to use of negotiation in any decisionmaking process by an administrative agency. "Negotiated rulemaking" is a specific application of regulatory negotiation, referring to the use of negotiation in the decisionmaking process associated with rulemaking. "Mediated rulemaking" is another name for negotiated rulemaking.

[4] Letter from John J. Keane, Consulting Technologist, General Electric Company, to Dr. Roland Droitsch, Deputy Assistant Secretary for Policy (June 3, 1987).

[5] See 51 Fed. Reg. 36876 (Oct. 16, 1986) (renewing MDA negotiating committee and changing name to "Mediated Rulemaking Advisory Committee").

[6] Negotiation is peer-to-peer resolution of differences. Mediation is a supplement to negotiation, in which a neutral person assists peers to arrive at a negotiated resolution of their differences.

> *Agencies should consider using regulatory negotiation, as described in this recommendation, as a means of drafting for agency consideration the text of a proposed regulation. A proposal to establish a regulatory negotiating group could be made either by the agency (for example, in an advance notice of proposed rulemaking) or by the suggestion of any interested person.*[8]

Negotiated rulemaking is only one of several alternative dispute resolution techniques that can be used by administrative agencies. Negotiated rulemaking is designed to facilitate resolution of "interest disputes." Other techniques are more suitable for rights disputes, such as arbitration, fact finding, and mediation. Each of these rights, disputes resolution techniques has been used or considered to some degree.

Administrative law in recent years has searched for ways to facilitate accommodation of conflicting interests.[9] Original administrative law models emphasized judicial review to keep agencies within statutory bounds, and decisional procedures designed to promote the accuracy, rationality, and reviewability of agency decisions.[10] This emphasis led to increased use of agency hearing procedures modelled on judicial trials. But administrative procedures modelled on judicial processes do not fit the needs of administrative rulemaking. Administrative law has struggled to provide a surrogate political process to ensure the fair representation of a wide range of affected interests in the administrative decision-making process.[11] But until the mid-1970's, procedures continued to be modelled on judicial trials, ill suited for a "surrogate political process."[12]

In the three years following adoption of ACUS Recommendation 82-4, negotiated rulemaking was utilized four times by federal agencies. The Federal Aviation Administration used negotiated rulemaking to develop a new flight and duty time regulation for airline flight crews.[13] The Environmental Protection Agency used negotiated rulemaking to develop proposed rules on nonconformance penalties for vehicle emissions, and on emergency exemptions from pesticide regulations,[14] and is well underway on other rule negotiations. The

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[7] The author of this report was Deputy Under Secretary of Labor from 1975-76, responsible for helping Secretary Dunlop promote the negotiated rulemaking idea to Department of Labor agencies, to the White House, to Congress and to university law, public administration political science, and management faculties.

[8] 47 Fed.Reg. 30708, 30709 (1982); 1 C.F.R. § 305.82-4 (1986).

[9] Perritt, *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 Geo.L.J. 1625, 1630-36 (1986); Stewart, *The Reformation of American Administrative Law*, 88 Harv.L.Rev. 1667 (1975).

[10] Perritt, *supra*, note 9, 74 Geo.L.J. at 1631-32; Stewart, 88 Harv.L.Rev. at 1670.

[11] 88 Harv.L.Rev. at 1670. See also Jaffe, *The Illusion of the Ideal Administration*, 86 Harv.L.Rev. 1183, 1184, 1188 (1973) (criticizing model based on assumption that Congress establishes an objective that "is capable of disinterested and nonpolitical administration," and suggesting instead a political model).

[12] See Perritt, *supra* note 9, 74 Geo.L.J. at 1631-32.

[13] For details of the FAA negotiation, see Perritt, *supra* note at 1667-74.

[14] For details on the EPA negotiations, see Perritt, *supra* note at 1674-82.

Occupational Safety and Health Administration encouraged labor, public interest and industry representatives to negotiate a standard for occupational exposure to benzene.[15] The benzene negotiations did not result in agreement among the parties on a proposed rule, but the other three negotiations did result in at least partial agreement, and in proposed rules based on the negotiations, ultimately promulgated in final form. None has been challenged.

Other agencies have shown an interest in the process, and other major negotiated ruling making efforts are under way.[16]

The early efforts were reviewed by the author of this report in a 1985 report to the Administrative Conference.[17] In order to provide guidance for use of the new process, the Administrative Conference published an additional set of recommendations in December, 1985,[18] proposed by the author of this report. The report accompanying ACUS Recommendation 85-5 concluded that negotiated rulemaking is a practical alternative to notice-and-comment or hybrid rulemaking, and that Recommendation 82-4 was basically sound. Assuming negotiations are permitted by the Administrative Procedure Act, recommendation 85-5 offers guidance on how agencies and private participants can increase chances of a consensus being reached.

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[15] For details on the benzene negotiation, see Perritt, *supra*, note at 1647-67.

[16] *See* 50 Fed. Reg. 42223 (Oct. 18, 1985) (EPA establishment of advisory committee to negotiate Farmworker Protection Standards for Agricultural Pesticides, and initial meeting on November 4, 1985 to complete outstanding procedural matters, to determine how to address substantive issues and to begin addressing them); 50 Fed. Reg. 48130 (Nov. 21, 1985) (announcing meeting of negotiating committee for December 6, 1985, to address issues of protective clothing, reentry intervals, notification, training, enforcement, greenhouses, nurseries, and medical monitoring); 50 Fed. Reg. 51748 (Dec. 19, 1985) (announcing meetings of negotiating committee for January 7, 1986 and February 4, 1986 to continue work on substantive issues identified in Nov. 21 notice); 51 Fed. Reg. 6595 (Fed. 25, 1986) (announcing two day meeting of negotiating committee for March 6, 7, 1986 to address procedural issues arising since last meeting and to continue work on substantive issues); 51 Fed. Reg. 13091 (Apr. 17, 1986) (announcing two day meeting of negotiating committee for May 5, 6, 1986 to review latest version of draft proposal). The farmworker protection negotiations, like those involving benzene, did not result in consensus. Nevertheless, at least some of the participants, including senior agency officials, viewed the negotiations as significantly productive, and expect them to have a major effect in shaping the proposed standard. The breakdown in the farmworker protection negotiations and subsequent developments was reported to the author by mediator Philip J. Harter in an MCI letter dated November 3, 1986. See also 51 Fed. Reg. 4800 (Feb. 7, 1986) (EPA request for comments on possible establishment of advisory committee to negotiate issues leading to NPRM on New Source Performance Standards for Residential Wood Combustion under §111 of the Clean Air Act); 51 Fed. Reg. 25401 (Jul. 14, 1986) (EPA request for comments on possible establishment of advisory committee to negotiate issues leading to an NPRM implementing restrictions on injection of hazardous waste mandated by §§3004(f) and (g) of the Resource Conservation and Recovery Act); 51 Fed. Reg. 25739 (Jul. 16, 1986) (EPA request for comments on possible advisory committee to negotiate issues leading to NPRM amending current regulations governing major and minor modifications to Resource Conservation and Recovery Act permits); 51 Fed. Reg. 5205 (Feb 12, 1986) (FTC notice of negotiated rulemaking to develop a dispute settlement procedure rule under 16 C.F.R. Part 703 and §110(a)(1) of the Magnuson-Moss Warranty Act, 15 U. S. C. §2310(a)(1) (1982)); 51 Fed. Reg. 29666 (Aug. 30, 1986) (FTC establishment of rule negotiation committee on same subject). *See also* 51 Fe.d.Reg. 45338 (Dec. 18, 1986) (Nuclear Regulatory Commission proposal to use negotiated rulemaking to develop proposal for electronic access to adjudicatory records); 52 Fed.Reg. 15820-01 (Apr. 30, 1987) (EPA proposed rule under section 203 of Title II of the Toxic Substances Control Act (TSCA), 15 U.S.C. 2643, to require all Local Education Agencies (LEAs) to identify asbestos-containing materials (ACM) in their school buildings and take appropriate actions to control release of asbestos fibers, developed through the negotiated rulemaking); 52 Fed.Reg. 15875-01 (Apr. 30, 1987) (EPA Model Accreditation Plan for persons conducting asbestos-related work in schools, discussed the in negotiated rulemaking); 52 Fed.Reg. 5467-01 (Feb. 23, 1987) (DOT notice of intent to form advisory committee for regulatory negotiation of rulemaking proposal concerning airline transportation of handicapped).

[17] H. Perritt, Analysis of Four Negotiated Rulemaking Efforts (Nov. 15, 1985) (available from the Administrative Conference of the

The 1982 ACUS recommendations address the place of negotiated rulemaking within the legal framework represented by the Administrative Procedure Act and judicially developed administrative law concepts. The 1985 recommendations, in contrast, address the dynamics of the negotiation process in the rulemaking setting. Together, the two ACUS recommendations present a framework for planning a rule negotiation.

### *B. Legal Framework for Negotiated Rulemaking*

Since 1982,[19] it is has become clear that rule negotiations can be accomplished within the flexible framework provided by § 553 of the Administrative Procedure Act. Through the negotiated rulemaking process, agencies provide affected parties with an opportunity to influence the substance of agency rules to a far greater extent than they can under the minimum requirements of § 553 merely by having notice of an agency-developed proposal and providing comments. Apparent problems with delegation of governmental authority to private parties, *ex-parte* communication in violation of the spirit of §553, and open meeting requirements under the Federal Advisory Committee Act have turned out to be largely illusory.[20]

There are some caveats with these conclusions, however. If a negotiated rule is to withstand challenge under the standards for judicial review set forth in §706 of the Administrative Procedure Act, the agency must act within its statutory mandate and must provide its own reasoned justification for the final rule. It is not sufficient for the agency merely to adopt without comment a bare rule worked out by the parties to a negotiation.

Any analysis of administrative law issues is necessarily somewhat academic because no judicial challenges to negotiated rules have materialized so far. The fact that no challenges have materialized is, of course, perhaps the strongest endorsement of negotiation as a process that satisfies the needs of the affected interests.

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United States). An edited version of the report appears at Perritt, *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 Geo.L.J. 1625 (1986) . Abbreviated summaries of the report appeared in Perritt, *Negotiated Rulemaking in Practice*, 5 J. Pol'y Analysis and Mgmt. 482 (1986), and Perritt, *Negotiated Rulemaking and Administrative Law*, 38 Admin L. Rev. 471 (1986). A broader synthesis appears in Perritt, *Administrative Alternative Dispute Resolution: The Development of Negotiated Rulemaking and Other Processes*, 14 Pepperdine L.Rev. 863 (1987).

[18] ACUS Recommendation 85-5, 50 Fed.Reg. 52893, 52894 (Dec. 27, 1985), 1 CFR §305.85-5 (1986).

[19] In 1982, ACUS recommended that the Congress amend the Administrative Procedure Act to authorize the use of negotiated rulemaking explicitly. See §2, ACUS Recommendation 82-4, 47 Fed.Reg. 30708, 30709 (1982), 1 CFR §305.82-4 para. 2 (1986).

[20] See Perritt, *Administrative Alternative Dispute Resolution: The Development of Negotiated Rulemaking and Other Processes*, 14 Pepperdine L.Rev. 863, 912 (1987).

Negotiated rulemaking does not violate the "delegation doctrine," which says that politically accountable officials should not delegate their policy-making authority to persons or institutions that are not politically accountable.[21] Under all the current conceptions of negotiated rulemaking, including ACUS Recommendations 82-4 and 85-5, negotiators play only an advisory role to the agency; the agency retains the final decisionmaking authority.[22] Such an advisory role has been approved by the courts in a variety of other circumstances.[23] Impermissible delegation obviously does not occur, for example, when private parties to an agency proceeding get together privately and compromise their differences. Moreover, the nature of negotiated rulemaking, if it is pursued under the ACUS recommendations, ensures adequacy of representation of affected groups. It provides its own form of political accountability, which probably is greater than when the agency makes rules unilaterally. Thus negotiated rulemaking avoids the problem of unaccountable decisionmaking that the delegation doctrine is intended to avoid.[24] If the affected interests have been represented fairly in the negotiation process, political accountability exists, and there is no need to be wary of delegation because the harm it seeks to avoid has been avoided *ab initio*.

The delegation doctrine overlaps other requirements imposed on agency decisionmaking under the APA and substantive statutes. Most delegation problems are avoided when rules are subject to judicial review under APA standards. In other words, the delegation doctrine is embodied in APA requirements and need not be addressed separately.[25] If the rule ultimately resulting from negotiated rulemaking passes judicial scrutiny under the within-statutory-authority, arbitrary-and-capricious, and in-accord-with-statutory procedures standards, it perforce has passed muster under the delegation doctrine.

Obviously agencies sponsoring negotiated rulemaking must act within the limits of the authority delegated to them. An essential attribute of judicial review of agency decisionmaking is an inquiry as to whether the agency acted within statutory authority or, conversely, whether it acted *ultra vires*.[26] The use of any particular procedure to aid agency decisionmaking cannot expand the authority delegated to an agency by Congress. Therefore an essential part of judicial review of agency decisions resulting from negotiated rulemaking must be an examination of the decision to see whether it is consistent with the agency's statutory authority.[27]

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[21] See Harter, 71 Geo.L.J. at 107-109 (1982); Note, *Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking*, 94 Harv.L.Rev. at 1880-83.

[22] 94 Harv.L.Rev. at 1882-83; Harter, *supra* note 21, 71 Geo.L.J. at 109. In all of the negotiated rulemaking efforts reviewed in this article, agencies unequivocally reserved final decisionmaking authority. *See* 50 Fed.Reg. 29,306 (1985) (FAA); 49 Fed.Reg. 17576 (1984) (EPA non conformance penalties); 49 Fed.Reg. 31,145 (1984) (EPA pesticide exemptions).

[23] See Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 399 (1940) (approving, against delegation challenge, statute permitting coal producers to propose minimum prices and other sales conditions to public commission that could approve, disapprove, or modify them); First Jersey Sec., Inc. v. Bergen, 605 F.2d 690, 697-700 (3d Cir. 1979) (approving self-regulation in securities markets), *cert. denied*, 444 U.S. 1074 (1980); Association of Am.Physicians & Surgeons v. Weinberger, 395 F.Supp. 125, 140 (N.D.Ill. 1975) (private establishment of standards to govern health care not invalid delegation because agency provides hearing on standards); see generally 94 Harv. at 1882 n.63 (citing other cases approving delegation to private organizations).

[24] 94 Harv.L.Rev. at 1883; Harter, *supra* note 21, 71 Geo.L.J. at 109.

[25] See Stewart at 1674-76.

[26] *See* Industrial Union Dep't v. American Petrol. Inst., 448 U. S. 607, 671, 686 (1980) (reviewing delegation doctrine) (Rehnquist, J., concurring in the judgment); Section of Administrative Law, American Bar Association, *Scope-of-Review Doctrine: Restatement and Commentary*, 38 Admin.L.Rev. 235, 246 (1986)

A multitude of administrative law doctrines militate against negotiation of a final rule without some opportunity for public comment.[28] Using negotiations to prepare a proposed rule, and then allowing notice-and-comment rulemaking, as has been the dominant practice in all negotiated rulemaking experiments to date, including the MDA negotiation,[29] is a sound approach, with few apparent disadvantages. Moreover, such publication and comment mitigates the effect of complaints by non-participants in the negotiations that they were denied a fair opportunity to influence the content of the rule.[30]

The *ex-parte* communication prohibition does not conflict with negotiated rulemaking, especially when:[31]

1. The rule ultimately adopted by the agency must be supported by factual information contained in the official record. There is no reason that the negotiators cannot discuss and even agree upon factual information to be put in the record.
2. Persons with an interest in the content of the rule must be afforded an opportunity to know the factual basis for the rule and to challenge facts submitted by opponents in an appropriate adversarial context. This opportunity may be provided by an opportunity to participate in the negotiations or by an opportunity to comment as part of the notice-and-comment process.
3. If the negotiation takes place among appropriately balanced interest representatives, the opportunity for adversarial exploration of policy and factual issues is preserved in the negotiation itself.[32]
4. Consultation between the agency and the negotiation participants after the "record" is closed should be permissible so long as such consultation focuses on policy, rather than new factual, matters.
5. Placing summaries of discussions in the "record" so that non-parties to the discussions can know of their substance and have an opportunity to respond, while not necessary in every case, enhances the likelihood that the *ex-parte* contact will be found permissible by a court.[33]

Finally, negotiated rulemaking should

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[hereinafter ABA Restatement].

[27] 5 U.S.C. §706(2)(C) (1982).

[28] §13 of ACUS Recommendation 82-4, 47 Fed.Reg. 30708, 30710 (1982), provides for publication of a negotiated rule for comment.

[29] *See* Perritt, *supra* note 9, 74 Geo.L.J. at 1671-72, 1679, 1681-82.

[30] See the FAA response to such complaints, discussed in Perritt, *supra* note 9, 74 Geo.L.J. at 1673-74.

[31] For a slightly different proposal, see Note, *Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking*, 94 Harv.L.Rev. 1871, 1888-89 (1981).

[32] See Note, *Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking*, 94 Harv.L.Rev. 1871, 1887-89 (1981) (suggesting that *ex-parte* problem could be avoided in negotiated rulemaking by judicial review limited to question of whether party claiming harm was represented adequately in negotiations).

[33] See Carlin Communications v. F.C.C., 749 F.2d 113, 118 n.9 (2d Cir. 1984) (no violation of agency rules or general principles of administrative law where *ex-parte* contacts summarized in record of notice and comment rulemaking).

present no problems with judicial review of agency action under the "arbitrary and capricious" standard of the Administrative Procedure Act. Section 706 of the Administrative Procedure Act[34] provides that a court may overturn an agency rule if it finds the agency's action in promulgating the rule was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[35] It is common for substantive statutes authorizing agencies to make rules to include similar standards for judicial review, or to incorporate the APA standard by reference.[36]

While considerable latitude is given for agency discretion, "an agency must cogently explain why it has exercised its discretion in a given manner."[37] Agency explanation takes on added importance because "an agency's action must be upheld, if at all, on the basis articulated by the agency itself.[38]

Uncertainty about facts may permit the agency to take one course of action or another based on its policy judgment, but the agency must explain its movement "from the facts and probabilities on the record to a policy conclusion."[39] It is not sufficient for an agency merely to recite the terms "substantial uncertainty" as a justification for its actions.[40]

A rule promulgated merely because it is agreed upon in negotiations among affected parties might be vulnerable to attack as being arbitrary and capricious,[41] unless the agency offers its own rationale and support for the content of the rule.[42] Of course part of the rationale can be the fact that affected interests reached agreement in negotiations. Because rationality also requires a nexus between the rule and factual support for it,[43] the agency rationale also should demonstrate factual support in a "record" developed in the rulemaking proceeding. While a detailed record of the negotiations could chill interchange among negotiators, there is no reason negotiators should not discuss what needs to be put in the record to support their consensus proposal, and what the agency should say in its rationale.

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[34] 5 U.S.C. §706 (1982).

[35] 5 U.S.C. §706(2)(A) (1982); Restatement, note 26 *supra* at 253-260.

[36] See, e.g. Occupational Safety and Health Act, 29 U.S.C. §655 (1982) (impliedly subjecting rules to APA review by exempting emergency standards from APA, while imposing additional requirement that agency determinations in rulemaking must be supported by "substantial evidence in the record taken as a whole"); National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §1392(b).

[37] 463 U.S. at 48.

[38] 463 U.S. at 50; Industrial Union Dept. v. American Petrol.Inst., 448 U.S. 607, 631 n.31 (1980).

[39] 463 U.S. at 52.

[40] 463 U.S. at 52.

[41] See Stewart, *The Reformation of American Administrative Law*, 88 Harv.L.Rev. 1667, 1799-1800 (1975) (no logical reason to preserve current concepts of judicial review if rulemaking is a political process with adequate representation of affected interests, but courts unlikely to change approaches); Note, *Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking*, 94 Harv.L.Rev. 1871, 1885-87 (1981) (suggesting that use of negotiation ought to relax judicial review standards); Wald, *Negotiation of Environmental Disputes: A New Role for the Courts?*, 10 Colum.J.Env.L. 1 (1985) (expressing wariness of requiring courts to consider adequacy of representation and opining that judicial review of negotiated rules will not change much).

[42] The FAA justification for the negotiated Flight and Duty Time rule and EPA's justification for the NCP rule are good examples. See Perritt, *supra* note 9, 74 Geo. L.J. at 1671.

[43] Requirements for support in the record for a rule, contained in substantive statutes, reinforces the need to give attention to the record support for a negotiated rule.

Even if there are flaws in the agency's articulated rationale,[44] it is appropriate for a reviewing court to consider whether the negotiating procedure used nevertheless sufficiently guarantees that the agency considered all the relevant factors.[45] "That the rule reflects a consensus of the affected parties therefore goes a long way towards meeting the goals of *Overton Park* and ensures that the rule is neither arbitrary nor capricious."[46]

But if the negotiated rulemaking procedure is to supply support for an agency decision that otherwise would be vulnerable to attack under the arbitrary and capricious standard, the reviewing court must assure itself that the negotiation procedure adequately ensured the participation of all affected interests.

### *C. Background of MDA Negotiation*

The Department of Labor decided to use negotiated rulemaking to facilitate setting a standard for 4,4' - Methylenedianiline ("MDA"). On October 22, 1985, the Department published a notice in the Federal Register[47] chartering a negotiating committee and soliciting requests from affected interests to participate in the negotiations.

MDA is a chemical used in producing polyurethane foams and elastomers. It has been identified by the National Toxicology Program as an animal carcinogen. Other animal studies, epidemiological evidence, structure-activity relationships, and mutagenicity studies all indicate that MDA is a potential human carcinogen.[48] Several thousand workers are exposed to dermal and respiratory exposure to MDA in the chemical, rubber and adhesives industries.

OSHA announced its intention to control workplace exposure to MDA on September 20, 1983, in an Advance Notice of Proposed Rulemaking.[49] EPA also has regulatory responsibility for regulating MDA under the Toxic Substances Control Act ("TSCA").[50] EPA decided to defer regulatory action to OSHA under §9 of TSCA,[51] obligating OSHA to notify EPA by early January, 1986 as to what regulatory action OSHA intended to take.[52]

### *D. Why MDA Was Suitable for Negotiated Rulemaking under the ACUS Criteria*

OSHA personnel and their lawyers believed MDA was a better candidate than benzene[53] for negotiated rulemaking because the possibility of EPA regulation created incentives for the parties to help develop an OSHA standard, because of the absence of a fundamental value conflict, because the number of interests affected was manageable, because of the absence of tort liability issues, because of a less litigious history, and because of a better committee process:

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[44] The agency's contemporaneous rationale must support the rule. *See* ABA Restatement, *supra* note 26, at 265. The agency's reasoning also must be logical. *Id.* at 255, 259.

[45] Consideration of all relevant factors is one requirement of the arbitrary and capricious standard. *See* ABA Restatement, *supra* note 26, at 250-51.

[46] Harter, *supra* note , at 65.

[47] 50 Fed.Reg. 42789 (Oct. 22, 1985).

[48] 50 Fed.Reg. at 42791.

[49] 48 Fed.Reg. 42836.

[50] 15 U.S.C. §§2601-2629 (1982).

[51] 15 U.S.C. §2608(a).

[52] 50 Fed.Reg. 27674 (Jul. 5, 1985).

[53] See Perritt, 74 Geo.L.J. at 1684. Benzene was selected by OSHA for negotiated rulemaking, but in late 1985 OSHA perceived that benzene was, in some respects, unsuitable for negotiation.

1. *The possibility of EPA regulation created special incentives for Industry and Labor groups to assist OSHA in developing a standard promptly.* Labor has less influence at EPA than at OSHA, and Industry may fear that EPA is less sympathetic to the economic impact of health and safety standards than OSHA.[54] Moreover, OSHA acceptance of the EPA referral under §9(a) of TSCA created a commitment for OSHA to issue a health standard regardless of whether the negotiation committee reached a consensus.

These factors satisfied the most important principle for effective regulatory negotiation: parties will negotiate only if they perceive the outcome of unilateral agency action to be worse for them than what is attainable in the negotiation.[55] ACUS, and a body of negotiation theory developed by Professor Roger Fisher at the Harvard Law School expresses this proposition in terms of the BATNA (Best Alternative to Negotiated Agreement) concept. The need for favorable BATNAs motivated Paragraphs 1 and 2 of ACUS Recommendation 85-5.[56]

> *An agency sponsoring a negotiated rulemaking should take part in the negotiations.*
>
> *Negotiations are unlikely to succeed unless all participants (including the agency) are motivated throughout the process by the view that a negotiated agreement will provide a better alternative than a rule developed under traditional processes. The agency, accordingly, should be sensitive to each participant's need to have a reasonably clear expectation of the consequences of not reaching a consensus. Agencies must be mindful, from the beginning to the end of negotiations, of the impact that agency conduct and statements have on party expectations. The agency, and others involved in the negotiations, may need to communicate with other participants — perhaps with the assistance of a mediator or facilitator — to ensure that each one has realistic expectations about the outcome of agency action in the absence of a negotiated agreement. Communications of this character always should consist of an honest expression of agency actions that are realistically possible.*

Paragraph 1 derives from the principle articulated in Paragraph 2. Paragraph 2 stresses that agencies should understand the major influence they have on party expectations and therefore on party BATNAs.[57] This is the major lesson learned from the unsuccessful benzene negotiations. The utility of participation for a party is properly understood in terms of the likelihood of a negotiated settlement that is equal to or better than every party's BATNA; else no consensus settlement can emerge. This means that the agency must be willing to communicate selectively to the parties possibilities for agency action that the particular party receiving the communication will find unfavorable. Just like a judge seeking to induce private litigants to settle a lawsuit, the agency, as decisionmaker, must point out the flaws in each party's argument and position, and ensure that each party understands why the outcome of agency action in the absence of negotiated agreement may not be as favorable as the party thinks.

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[54] This provides incentives for the affected interests to work out a consensus rule as opposed to letting the traditional adversarial regulatory process take its course. See BATNAs

[55] This is the thrust of Recommendation Number 2 from ACUS Recommendation 85-5, 1 C.F.R. §305.85-5 para. 2 (1986).

[56] 1 C.F.R.§305.85-5 paras. 1,2 (1986).

[57] The BATNA concept is explained in Perritt, *supra* note 9, 74 Geo. L.J. at 1712-13.

Agency participation in negotiations, addressed in Recommendation Number 1, promotes realistic party expectations. Instead of fearing premature disclosure of tentative staff views, the agency should welcome disclosure of such views, because they can educate affected interests on what the agency might do in the absence of a negotiated rule.[58]

2. *The absence of human carcinogenicity studies made fundamental values less an issue for MDA than for benzene because there was more room for argument as to the human health effects of MDA.* This reflected consistency with ACUS Recommendation 82-4's *Absence of Fundamental Value Conflict* precept.[59] The regulation to be developed cannot involve compromise of deeply held beliefs or values. This would involve costs higher than most parties could tolerate.

Moreover, uncertainty with respect to research conclusions satisfied the *Research Not Determinative of Outcome* precept of ACUS Recommendation 82-4. Resolution of a dispute should not depend on research results. The parties may be unwilling to formulate or compromise positions in the face of scientific uncertainty. Research results might produce a clear victory for one interest.[60] But even if a clear win or loss might result from the research findings, the parties still might choose to negotiate parallel or peripheral issues.[61] Also, the parties might negotiate issues to be researched and the way in which the research should be conducted.

3. *Fewer industries and labor organizations were concerned with MDA than with benzene.* Also, the parties affected by an MDA standard were easier to identify because industrial use of MDA is more limited than industrial use of benzene. This would make constructing a workable committee easier.

4. *The absence of large-scale health effects already manifesting themselves removed the tort liability issue which affected the benzene negotiations.*[62]

5. *Because there was no existing standard for MDA and consequently no litigation history, party positions were less concrete and there was less polarization among parties.*

6. *The process OSHA intended to use for MDA standard negotiations was expected to work better than the process used for benzene negotiations.* In particular, OSHA intended to follow the Federal Advisory Committee Act, and intended to participate actively in the MDA negotiation.[63]

OSHA utilized the FAA and EPA negotiations as a model for its MDA negotiations. It chartered an advisory committee as the forum for negotiations. OSHA participated actively in the MDA negotiations, expecting this participation to increase the usefulness of the negotiations.[64] Because OSHA contemplated that "consensus" would be defined more broadly than in the benzene negotiations, it expected to gain a sense of feasibility of different types of standards, rationales for party positions, and some narrowing of issues, even if the negotiators had been unable to agree on a PEL.[65]

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[58] Such conditioning of party expectations by the agency is delicate; it can reinforce party fears that the agency will not participate in the negotiations in good faith, or can chill meaningful party contributions by signalling that the agency has its mind made up.

[59] Id. at 49-50. This corresponds to §4(b) of ACUS Recommendation 82-4, 47 Fed.Reg. 30708, 30709 (1982), 1 CFR §305.82-4 para. 4(b) (1986).

[60] See Perritt, *And the Whole Earth Was of One Language: A Broad View of Disputes Resolution*, 29 Vill.L.Rev. 1221, 1253-56 (1984) (explaining how similar perceptions of probable outcomes make negotiated resolution more likely). Uncertainty can improve the attractiveness of negotiated resolution to risk-averse parties, but similar predictions of outcome probably are more important. Id.

[61] Id. at 51, n. 276.

[62] 74 Geo.L.J. at 1651-52.

[63] See Perritt, *supra* note 9, 74 Geo.L.J. at 1661, 1664 (explaining how OSHA's non participation and efforts to avoid FACA adversely affected the benzene negotiation).

OSHA used a mediator assigned by the Federal Mediation and Conciliation Service as a facilitator.[66] This complied with Paragraph 5 of Recommendation 85-5 which says:

> *The agency should select a person skilled in techniques of dispute resolution to assist the negotiating group in reaching an agreement. In some cases, that person may need to have prior knowledge of the subject matter of the negotiations. The person chosen may be styled "mediator" or "facilitator," and may be, but need not be, the same person as the "convenor" identified in Recommendation 82-4.*[67]

The initial Federal Register notice, following the example of the FAA and EPA notices,[68] identified 13 specific issues for the negotiations to address, listed potential participants, and invited comment on the makeup of the negotiating group.[69] The notice committed OSHA to use any negotiating consensus as the basis for its NPRM for MDA[70] but declared that OSHA would terminate the negotiations and proceed on its own if no consensus was reached within six months.[71]

### E. *Intellectual Capital for the Negotiation*[72]

Before a governmental institution can use a new concept successfully, it must be reasonably persuaded that the concept will have some degree of legitimacy in the perceptions of its major constituencies; it must know what increases and decreases the probabilities of success or failure in using the concept; and it must have some information available to it on how to use the concept in terms of practical implementation.

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[64] 50 Fed.Reg. at 42792 (OSHA representative will be a full and active participant).

[65] 50 Fed.Reg. at 42791 (referring to "rank[ing] of priorities" and "identif[ication] of acceptable solutions" as well as agreement on regulatory text and supporting rationale).

[66] 50 Fed.Reg. at 42791.

[67] Convenors and mediators play different roles in negotiated rulemaking. Convenors assist agencies in deciding whether a particular subject is suitable for negotiated rulemaking. They determine who are the affected interests and informally contact those interests to explore their to participate in a negotiation. 1 C.F.R. §305.82-4 Paragraph 4 (1986). Mediators become involved in the actual negotiation, helping the parties to agree on a procedure and to narrow their substantive differences. See 1 C.F.R. §305.82-4 Paragraph 10; §305.85-5 Paragraph 5 (1986). "Facilitator" is just another name for a mediator, the use of which may be desirable to reduce anxiety experienced by those who object to the idea of using a labor-management negotiation model for administrative rulemaking.

[68] See Perritt, *supra* note 9, 74 Geo.L.J. at 1668, 1676-77, 1680.

[69] 50 Fed.Reg. at 42792.

[70] 50 Fed. Reg. at 42790.

[71] 50 Fed.Reg. at 42792. The deadline was extended, and consensus eventually reached in May, 1987, some 19 months after the first Federal Register notice, and 10 months after the first committee meeting.

[72] "Intellectual capital" refers to knowledge available to an agency from academic literature and from its own experience.

The ACUS recommendations and Secretary Brock's commitment to regulatory improvement provided important sources of legitimacy. The MDA negotiated rulemaking effort was informed by the Benzene negotiating experience. Personnel from OSHA and the Solicitor of Labor's office who designed the MDA effort proceeded from conclusions about why the benzene negotiation did not produce consensus.

The ACUS Report and recommendations were available to labor department personnel and to the MDA participants.

## III. CHARACTERISTICS OF MDA COMMITTEE PROCESS

### A. *Committee Membership*

The October 22, 1985 notice[73] solicited participants for the mediation process. As a result of the request for participants, three unions, the United Auto Workers (UAW), the United Steel Workers of America (USWA) and the Oil, Chemical, and Atomic Workers (OCAW) offered names of potential representatives for the Mediated Rulemaking Advisory Committee. OSHA selected representatives from the United Auto Workers and Steel Workers to participate in these mediation activities. OCAW withdrew its request for representation, after OSHA was unable to accommodate OCAW's demand that OMB not review any committee recommendation. After informal discussions among Deputy Under Secretary Schlossberg, OCAW, and the International Association of Machinists and Aerospace Workers (IAM), and discussions among OSHA and Solicitor of Labor personnel and the IAM, the IAM agreed to designate a representative for consideration. OSHA's reviewed IAM worker populations and determined that IAM represents a significant number of workers occupationally exposed to MDA and hence was an appropriate labor representative. Later, the UAW representative resigned and was replaced by a labor representative from the United Brotherhood of Carpenters and Joiners of America.

In addition to the unions that nominated participants, three trade associations representing employer groups also expressed an interest in participating in this rulemaking effort: The National Electrical Manufacturers Association (NEMA), the Suppliers of Advanced Composite Materials Association (SACMA) and the Chemical Manufacturers Association (CMA). Representatives from these groups reflect employer interests in primary, secondary and, to some extent, downstream use of MDA. One representative for NEMA and SACMA and one representative of CMA were selected for the committee. The other recommendations for representation came from the Department of Energy, Brookhaven National Laboratory, Sandia National Laboratories, the National Institute for Occupational Safety and Health, the Environmental Protection Agency, and the Occupational Safety and Health Administration for the state of California. All were selected.

OSHA published the final committee configuration in the Federal Register on July 3, 1986,[74] and the Committee met for the first time on July 22, 1986.

In groundrules[75] adopted at the first meeting, the committee:

> established the requirements for the size of the committee and certain mem-

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[73] 50 Fed.Reg. 42789 (Oct. 22, 1985).

[74] 51 Fed.Reg. 24452 (July 3, 1986) (also announcing the first date the group would meet and the proposed agenda).

[75] The MDA Committee's "groundrules" correspond to the "protocols" established by earlier negotiated rulemaking committees. See Perritt, 74 Geo.L.J. at 1659 (describing benzene negotiation protocols).

> ber obligations. The Committee agreed that its size should be limited to fifteen members including a mediator and that the process would begin once the Committee roster was published in the Federal Register. Additionally, the Committee agreed that individual members could make use of experts at their own expense. However, the testimony of these experts would be limited to providing additional and/or clarifying information. Furthermore, the Committee restricted oral presentations by these experts by first requiring a majority vote of the Committee. The Committee believed that the use of experts in this manner is a crucial element of order, in that uncontrolled or excessive participation by outside sources would impede the progress of the Committee. Further, the Committee agreed that the appropriate forum for testimonial presentations is through the public hearing process and not through the Advisory Committee. The Committee agreed that meetings would be open to the public, however, the Committee reserved the right of interest groups to caucus in private.[76]

A sixth set of groundrules adopted at the first meeting addressed participation issues like quorum and proxies:

> The sixth set of the ground rules . . . also established procedures for members holding proxy votes. The giving of a proxy by a Committee member to another Committee member was restricted to those of the same representational interest. Many Committee members argued that a member should be allowed to give proxy votes to non-members. Furthermore, they argued that work loads were such that their attendance at all of the meetings may not be possible and thus would prefer participating through a fellow employee. The Committee, however, agreed to restrict the use of proxies for several reasons: First, the transfer of proxy votes is restricted to members by OSHA Advisory Committee regulation (29 CFR 1912.29). Second, and more importantly, consistent changing of Committee participants would not be conducive to the mediation process. It is essential that a participant have all the facts before him and be prepared to develop solutions to issues by being present and participating in the entire mediated rulemaking process. Anything short of total participation hampers the individual's ability to meet the challenge set forth by Assistant Secretary Pendergrass. In fact, the potential to be accused of "not bargaining in good faith" is heightened by "switching representatives". This section also contains the quorum requirements. The Committee agreed that two-thirds of the members would constitute a quorum, as long as at least two members who represented employees and two members who represented employers were present. In addition, a member holding a proxy counted as only one vote for quorum purposes. Initially, some members argued that a quorum should be formed when only one member representing employees and one member representing employers were present. However, both employer and employee representatives opposed this suggestion, stating that the potential for the outcome of a session to fall entirely on an individual member of an interest group would not serve the interest of the entire Committee. Furthermore, this would be excessively burdensome and clearly not supportive of the basic Committee concurrence concept which purports to solicit information from 14 individuals which in turn will be used as the basis for the Committee recommendation. Committee Counsel, provided by the Department of Labor, noted that the success of this effort revolved around the degree of participa-

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[76] 52 Fed.Reg. 26776, 26777 (July 16, 1987) (characterizing "second set" of groundrules).

tion offered by each Committee member. The entire Committee agreed that participation was important to the success of this project and that the responsibility for accomplishing this task should be shared equally by all the Committee members, thus the more stringent quorum requirements were developed.[77]

The basic concept for representation was a sound one: having health professionals, Labor, Industry, and regulatory agency representation. The occasional need for other expertise could have been satisfied by establishing task forces not necessarily limited in membership to committee members to address certain issues and report back to the committee.

Some members thought that the committee was somewhat too large for comfortable functioning, especially since it was slow to break into working groups to develop particular provisions of the NPRM proposal.

Throughout the committee's activities, constituting a quorum was a serious problem. The committee ground rules required that at least two representatives of the union side and management side be present before any meeting of the committee could conduct business. Absent representatives could give proxies to other representatives, but the proxies were not counted for quorum purposes. The UAW representative rarely attended, generally showing little commitment or interest in the committee's activities. In addition to the unevenness of union representation, the State of California representative had to be replaced after the first meeting.

The committee members were unusually skilled and committed. The committee's best work proceeded from a base of professional respect for the other members as individual experts more than a perception of them as mere representatives of their constituencies. Several committee members stressed how close the bond was among committee members by the time a consensus document was delivered to OSHA. Trust and good working relationships among committee members were not achieved immediately, however. It took a period of time, the most productive of which was in small informal working groups, for committee members to develop real professional respect for each other. One participant (not from the management side) observed that some of the management representatives were so skilled that they could have produced success almost no matter what the conditions of OSHA participation or mediation were.

### *B. Workload and Time Commitment*

The Committee met formally seven times for a total of 24 days.[78]

One of the seven committee meetings took place in Salt Lake City near a facility in at which MDA was used. The committee visited the facility in conjunction with the meeting. All members of the committee felt that the facility visit was useful. It served to give the committee members a shared set of perceptions and experiences, which enhanced trust and communication. It also permitted committee members to focus on real world problems as opposed to extrapolating from textbook or theoretical perceptions.

Meetings at Department of Labor facilities in Washington were unsatisfactory, for a variety of reasons. The air conditioning was turned off at 5:00 P. M. Also, meeting in Department facilities tended to reinforce concerns about the independence of the committee. Meetings at other locations in Washington were better, but still tended to force the committee meeting into a 9-to-5 mold, since so many members were from the

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[77] 52 Fed.Reg. 26776, 26778 (July 16, 1987).

[78] 52 Fed.Reg. 26776, 26776 (July 16, 1987).

Washington area. Out-of-town meetings created more opportunity for serious mediation extending beyond the regular working day, and for development of greater trust among committee members through social contact.

Almost everyone underestimated the amount of time that would be required for effective participation. Many of the committee members were surprised at how much work had to be done to sort through the details of the substantiation for a standard. As one member put it, "If we had known at the outset how much we had to do, we would have moved faster. As it was, most of the work was done after January, 1987."

This presented major difficulties in the case of some union representatives, who were senior officials and had many competing demands on their time. In retrospect, estimates as to the time required, given at the beginning of the negotiation, were unrealistic. Some members thought the time demands on committee principals could have been moderated by providing for union representation on working groups through lower level technical personnel who would have had more time available.

Some members of the committee may have participated mainly to observe, to oppose approaches unacceptable to them. Other members intended from the outset to participate fully in actually developing a standards. Therefore a given level of time expenditures may have seemed unreasonable to some members and reasonable to others.

### *C. Intra-constituency Disagreements*

Simple models of negotiation dynamics[79] assume monolithic parties: that parties affected by regulatory decision-making behave like rational individuals. In the real world, parties are not monolithic, and intra-constituency disagreements complicate negotiations. Resolving intra-constituency disagreements depends on the characteristics of interest groups.[80] Real parties are represented by individual human beings, but the individuals express the views of a group of constituents who usually have divergent views. The relations within constituency groups and between constituency groups and individual negotiators complicate the regulatory negotiation dynamics.

Experienced mediators know that three agreements are really involved in any successful two-party negotiation: (1) an agreement between negotiator A and his constituents, (2) an agreement between negotiator B and her constituents, and (3) an agreement between negotiators A and B.[81] Agreements (1) and (2) can be called "intra-constituency agreements." Frequently the most difficult mediation job involves achieving the intra-constituency agreements rather than achieving the negotiator-negotiator agreement.

The intra-constituency problem is more difficult in regulatory negotiations than in labor negotiations, because the "parties" to regulation negotiation are likely to be ad-hoc groups or coalitions without formal processes worked out for internal decision making. Ordinarily in regulatory negotiation, there is no equivalent of the "exclusive representation" principle from the law of collective bargaining[82] available to bind constituents to the position taken by or agreed to by an industry representative. At any point an individual constituency may disavow its putative representative in the negotiations, take its own position on matters under negotiation, present formal positions to the agency inconsistent with positions taken by its "representative," or sue to have the negotiated rule set aside by the courts.

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[79] *See* Perritt, *supra* note 9, 74 Geo. L.J. at 1636-39.

[80] See Perritt, *supra* note 9, 74 Geo.L.J. at 1639.

[81] Dunlop, 29 Vill.L.Rev. at 1433 (referring to the need for three agreements to conclude a negotiation).

[82] See §9(a), National Labor Relations Act, 29 U.S.C. §159(a) (1982) (exclusive representative); §2, Ninth, Railway Labor Act, 45 U.S.C. §152, Ninth (1982) (same).

Extreme positions by trade groups reduce intra-constituency differences, but make negotiations more difficult. When representatives must make compromises at the bargaining table, the intra-constituency problem becomes worse.

The groundrules adopted by the MDA Committee acknowledged that "participation in these mediated efforts [would not] formally bind, in a legal sense, the participant, his company, or his interest."[83] This approach, resembling the approach taken in earlier rule negotiations, acknowledged reality,[84] and also undoubtedly relieved some pressure on interest representatives on the committee.

No constituency disagreements on the union side were apparent to any of the representatives. Union representatives reported no pressure from non-represented international unions or from AFL-CIO staff.

Constituency disagreements on the industry side occurred but were not a serious problem. Initially, some industry trade associations were nervous about compromises being made in the negotiations, but these were handled in one instance by industry representatives making it clear to the trade associations in advance that compromises would be required and that industry participation was pointless unless the industry groups were prepared to consider modifying their historical doctrinal positions. In another instance, the industry representative offered to withdraw and have anyone else replace him that the trade association wished. The offer was declined and criticism diminished thereafter.

## *D. Agency Representation*

A crucial difference between the benzene negotiation and the MDA negotiation was that OSHA did not participate in the former and played a central role in the latter:

> the Committee agreed that OSHA should retain primary responsibility for developing the issues and drafting the text to be considered by the entire Committee. The final set of ground rules involved OSHA's responsibility to the Committee. The Committee agreed that the final product of the mediation process would serve as the basis for the Committee's recommendations for a proposed rule regulating occupational exposure to MDA. OSHA agreed to publish within 90 days of the close of the mediation process its own notice of proposed rulemaking. OSHA however, agreed to use the Mediated Rulemaking Advisory Committee's report as the basis for its Notice of Proposed Rulemaking (NPRM), except for any provision it found inconsistent with OSHA's statutory requirements or otherwise unjustified. The Agency accepted the burden of justifying any deviation in its proposed rule from the Committee's recommended standard. OSHA also agreed to publish a final rule within 180 days after the issuance of its proposal or after the certification of any hearing record.[85]

In addition, the Committee agreed to defer to some extent to pre-existing OSHA policies. The Committee's fourth set of ground rules called for OSHA to provide draft language 20 days prior to each scheduled session. Of greater significance, the same set of groundrules provided that "Policy matters mandated by the Occupational Safety and Health Act or previously adopted by the Agency are not subject to negotiation."[86] The Committee recognized that deferring to OSHA policy created the potential to undermine the entire mediated rulemaking process.

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[83] 52 Fed.Reg. 26776, 26779 (July 16, 1987).

[84] See Perritt, *supra* note 9, 74 Geo.L.J. at 1638.

[85] 52 Fed.Reg. 26776, 26779 (July 16, 1987).

> The Committee accepted this ground rule only because the Committee recognized that the Agency was bound, either by law or by policy, to implement certain provisions or adopt various concepts. For example, even if the entire Committee agreed to exclude medical surveillance in its recommendations, the OSHA representative would still be bound to make the recommendation to include medical surveillance for it is OSHA's belief that this is mandated through the OSH Act and past policy considerations. Thus, the Committee agreed that it could be more productive if it worked within the same guidelines as those that bind the Agency. The Committee, however, agreed that in those instances that law or policy prevents compromise, to make dual recommendations; the first being to amend the law or policy and the second an alternative recommendation. The Committee considered various proposals in developing suitable alternative provisions. In fact, all proposals were considered as long as the primary objective of this project, i.e., providing the worker with a safe and healthful workplace, was not compromised. The recommendations developed by this Committee neither contradict OSHA policy nor compromise worker benefits expected from an occupational standard regulating worker exposure to MDA.
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> An artful blend of policy, principles, and compromise was demonstrated through the Committee's recommendations for assessing the risk of occupational exposure to MDA. Clearly, the Agency had previous policies and practices for determining risk and making significant risk determinations; the Committee acknowledged these policies and made findings, such as significance of risk, in accordance with these mandated practices. However, the recommendations for making risk assessments were also founded on sound scientific principles, many of which also serve as the basis for OSHA policy.[87]

Everyone agreed that active OSHA participation in the committee deliberations was absolutely essential. This was true not only because of the staff role played by the particular OSHA representative, but also because of the necessity of having OSHA research and policy information disclosed to the committee if it was to function effectively. In addition, the OSHA representative provided essential information about OSHA policy views which the committee needed in order to formulate its own consensus recommendation. Had OSHA not participated, it is unlikely that the committee would have completed its work, because of concerns that OSHA would not take any resulting consensus seriously.

The particular role played by OSHA representative Patti Waugh in the MDA negotiations also was essential to its success, in the opinion of virtually every participant. Ms Waugh served as the primary staff person for the committee, providing documentary materials for regulatory language, for risks and cost analysis, recording committee views, and duplicating draft committee documents. As one member of the committee put it, the OSHA representative "worked herself nearly to death," bringing her children in on weekends to help with Xeroxing of committee materials. "She got *no* help from OSHA. If Patty had been less heroic, we would never have got finished and the effort would have been viewed as a dismal failure."

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[86] 52 Fed.Reg. 26776, 26777-78 (July 16, 1987).

[87] 52 Fed.Reg. 26776, 26777-78 (July 16, 1987).

The main difficulty with OSHA representation was the need for additional staff support to perform administrative functions, especially document preparation and duplication.[88]

The most serious problem in the course of the MDA negotiations was the skepticism felt by mid-level OSHA personnel about the utility of the negotiated rulemaking process for setting an MDA standard and the particular way in which OSHA representation on the committee was handled. Much of this concern related to a perception that MDA deserved no more OSHA resources than other, possibly more urgent, health standard activities. Also, there was a concern that the OSHA representative would commit the agency to positions that had not adequately been reviewed and adopted by appropriate policy level personnel.[89]

The MDA negotiation almost was aborted until the new Assistant Secretary of OSHA, the Assistant Secretary for Policy, and the mediator worked together to communicate the importance that the Secretary and new Assistant Secretary for OSHA attached to the rule negotiation experiment and to develop more explicit procedures for policy review of OSHA positions called for during the negotiations. Also, a new Director for Health Standards was appointed early in the MDA negotiation effort. The new director had more interest in the MDA negotiation than his predecessors, and clearer ideas about how to integrate the MDA negotiated rulemaking with on-going standards development processes within the regular OSHA organization.

After this was accomplished, policy level officials attended some of the negotiations and their observations reassured them that the OSHA representative could handle her responsibilities artfully without embarrassing the agency.

An alternative agency representation arrangement would have included on the committee a policy level OSHA person, as close as possible to the agency head level, in addition to working-level standards development personnel. Such an arrangement would have minimized the possibility that the health standards person would be overruled by policy level people or that a policy level representative on the committee would not properly represent views derived from the greater expertise held by standards development personnel. But some committee members felt that more policy input from OSHA was undesirable. According to this view, the committee was constituted to focus outside advice, and that it should be admissible for this advice to deviate from current OSHA policy. As OSHA policy input is strengthened, the possibility of this occurring is reduced.

It is doubtful whether an OSHA representative from a higher level in the agency would have been as effective as the representative from the health standards organization within OSHA. Much of the committee's time was spent with detailed review and discussion of health effects, technological feasibility, economic impact and alternative ways to protect against certain types of health hazards. Expertise in industrial hygiene and the way in which health standards have been set in the past was essential for meaningful OSHA participation in the committee meetings. It is doubtful whether an OSHA representative from a higher policy level would have had the detailed expertise necessary to participate as meaningfully.

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[88] See §III(E) regarding administrative support. Ideally, an additional lower level OSHA representative would have been available as an administrative support person to perform these functions.

[89] The OSHA representative worked at a relatively low level in the agency. The OSHA representative on the MDA committee was a health standards "project officer." Project officers have substantial responsibility for developing health standards but do not have supervisory responsibility. A project officer's chain of command runs through a manager, thence through the Director of Health Standards, thence through a Deputy Assistant Secretary to the Assistant Secretary of Labor for Occupational Safety and Health.

Also, the OSHA representative had no other major responsibilities during the committee functioning. This permitted her to give full time and attention to the substantive and administrative responsibilities associated with the committee. A higher policy level person would have other administrative and substantive duties. Because of these distractions, a policy level official could not have participated as effectively even if the particular individual selected had substantial expertise in the subject matter.

Some members thought the OSHA representative was over involved in controlling every detail of the negotiation. As one participant put it, "She had been working with MDA for years, and the standard was her baby. She had a hard time letting go of the details." Undoubtedly conditioned by her previous experience in writing notices of proposed rulemaking herself, she was reluctant to allow committee subgroups to work independently of her control of drafts and materials in order to develop particular portions of the NPRM. Subgroups were proposed in the first meeting, and rejected primarily because of OSHA objection. A slightly different subgroup idea resurfaced in the last meeting, when it was clear the committee could not complete its work without delegating some of the details to subgroups. But some members felt that the OSHA representative had to be concerned with detail. In their view, subgroups are useful only to develop general concepts; the concepts still have to come back to a technical expert to work out detailed language. According to this view, greater use of subgroups would have slowed down the committee's work.

OSHA did not distinguish clearly enough between OSHA positions that, in the agency's view, were mandated by law; agency positions, in the agency's view, dictated by prudential reaction to past judicial review; and agency positions that simply reflected matters of discretionary policy. OSHA participation would have been better if OSHA had concentrated on providing guidance to the legal requirements for rulemaking, summarizing the committee's agreed upon operating protocol, and participating in the discussions by distinguishing clearly among OSHA's view of legally mandated provisions, prudential provisions reflecting past judicial review, and provisions desirable because of OSHA's policy position. Also, OSHA could have been clearer as to matters of fundamental policy, as opposed to matters of policy preference that can conceivably could be varied. OSHA did provide some of this information at the first committee meeting, but more repetition and reinforcement may have been appropriate in the context of actual committee deliberations.

## E. *Administrative Support*

The OSHA representative served as the executive secretary of the negotiating committee as well as a substantive representative of the OSHA position and an occasional *de facto* mediator of substantive disagreements. During the first part of the committee's activities, the administrative burden of typing, reproducing and mailing documents for the committee was nearly insuperable. Little assistance from within OSHA was available to the OSHA representative.[90] Nevertheless, the committee needed a large volume of draft language and summaries of positions if it was to proceed according to schedule. In addition, the committee desired to have minutes recorded and distributed promptly after meetings. This was done for some early meetings, but was not done for later meetings. The availability of minutes facilitated committee member review of draft documents.

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[90] OSHA management says that resources were made available but were used rarely.

Slowness in reimbursing travel was a universal complaint. At least three members of the committee had not received travel reimbursement after a six month delay, when contacted by the author of this report. One committee member said, "There is no excuse for travel reimbursement not to be able to be paid from November to May, except blithering incompetence." OSHA also apparently failed to give prompt notification of some changes in meeting dates and sites to some committee members.

From time to time, additional resources formally were made available to the OSHA representative, but because these personnel had additional duties, it remained difficult for her to get responsive support. Finally, a contractor (ICF, Inc.) was hired to assist both with administrative support and certain risk-, technological feasibility-, and economic-assessment analyses for the committee. The contractor arrangement worked well and is a means of support worthy of consideration in all rule negotiations.

A microcomputer was made available to the committee after considerable effort. The computer proved helpful because it permitted redrafts of portions of the standard to be generated during a committee session, and printed out immediately for committee member use. Even better, was a large video screen[91] used during one committee meeting, which displayed text from the word processing software running on the computer so the entire committee could see it at the same time. As changes were suggested, they could be entered on the keyboard and displayed immediately on the screen. Unfortunately such a display device was not available at the committee's other meetings, apparently because no one on the committee thought to request it again.

One difficulty experienced with the microcomputer was that the committee's deliberations sometimes were recessed while the OSHA representative input language changes into the computer.

### *F. Departmental Involvement*

The MDA effort had the active support and involvement of three departmental organizations outside OSHA; the Deputy Undersecretary for Labor Management Relations and Cooperation, the Assistant Secretary for Policy, and the Solicitor of Labor.

The Deputy Under Secretary assisted in arranging appropriate representation from organized labor, and helped to reduce labor movement concerns about negotiated rulemaking in general and its use to formulate a rule for MDA in particular.

Active participation by a representative of the Solicitor of Labor was highly constructive. The Solicitor's representative had been interviewed extensively in the investigation leading up to the ACUS report and had mature conclusions about the best way for future rule negotiations to be handled. James Estep, Assistant Counsel for Hearings, played a crucial role in designing and promoting the MDA negotiation. Not only did the selected representative support the negotiated rulemaking process and provide assistance to the committee evaluating alternative approaches, but the official presence of the Solicitor's office helped deal with the occasional internal OSHA problems as the committee began.

The Solicitor's representative was extremely helpful both in terms of group dynamics and de facto mediation activities and also in assisting the committee develop a better understanding as time went on of the legal requirements for OSHA rulemaking. Because of the illness of the original Solicitor representative, however, necessitating his absence for several meetings, some members of the committee felt that the committee lacked consistent legal advice. For example, one reason that the OSHA representative opposed subgroups was her belief that the committee charter, and ultimately the Federal Advisory Committee Act, prohibited such subgroups. Some members felt that effective legal advice on this issue was not available.

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[91] The screen, an analog video display which could accept digital character output from the microcomputer with the aid of a communications board, was borrowed from OSHA's Salt Lake City laboratory.

The Assistant Secretary for Policy, acting through Deputy Assistant Secretary Roland G. Droitsch, actively supported the MDA negotiation effort, encouraging the new Assistant Secretary for Occupational Safety and Health, who took office just as the MDA negotiation was beginning, to support it and to ensure internal support within OSHA. When disagreements within the OSHA health standards organization threatened to abort the MDA negotiating effort, the Assistant Secretary and the Deputy Assistant Secretary played an internal mediation role, working with the FMCS mediator, the OSHA and Solicitor representatives of the MDA negotiating committee, and policy officials within OSHA to resolve differences so that the negotiation could proceed.

The most serious threat to the MDA negotiation came in late spring and early summer, 1986. Notices of OSHA intent to use negotiated rulemaking had been published in the federal register, and preliminary steps had been taken to select negotiating committee representatives. No meetings of the negotiating committee had been held, however, although the FMCS mediator had been selected and was actively involved. Conflicts between the OSHA representative on the negotiating committee and higher level personnel within the health standards organization at OSHA threatened to abort the negotiation. The OSHA representative was pressing for commitments of additional administrative resources for the negotiation and for expedited review of whatever consensus might be reached in the negotiation. The health standards officials were concerned that scarce OSHA resources were being dissipated by an undo commitment to the MDA negotiation and that it was inappropriate for the negotiated rulemaking process to circumvent normal standards development processes. Progress had been virtually stalled by these disagreements, and it took a threat by the mediator to withdraw and internal mediation by the office of the Assistant Secretary of Policy, before the negotiation was able to proceed to its first meeting.

### *G. OMB Involvement*

Under Executive Order 12291,[92] OMB has a major role to play in agency rulemaking. The MDA negotiators were confronted with the theoretical possibility that they might reach a consensus that would be unobjectionable to OSHA and to the Secretary of Labor, but objectionable to OMB. Two alternatives for integrating committee deliberations with OMB and agency views theoretically existed. The first alternative (not selected) was to provide for this integration at the beginning of the negotiations, either by putting OMB and OSHA policy level personnel on the negotiating committee, or by providing more informal means for ascertaining OSHA and OMB reaction to committee positions from the beginning.

The other alternative was the one followed. Under this alternative, the committee did its work with an OSHA representative as a member of the committee but did not try to speculate as to what policy objections to potential committee consensus might exist either within DOL or at OMB. Under this alternative, it was expected that the committee would reach consensus if possible, present that consensus publicly to OSHA, have it published in the Federal Register, and let DOL and OMB adjust the consensus recommendation as required by policy concerns afterwards.

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[92] 46 Fed.Reg. 13193 (Feb. 17, 1981), reprinted as note to 5 U.S.C.A. §601 (West 1985 Supp.).

Before the final stages in the committee deliberations, consideration was given to consulting OMB and advising the committee of any OSHA-desired and OMB-desired changes in the committees views so that the final committee consensus would be guaranteed acceptance by OSHA and OMB. The perceived advantages of such an approach were that the committee would be assured that its consensus recommendations would be the NPRM with few changes.

The risks of such an approach were that introducing OSHA and OMB views at a relatively late stage in the negotiation process might delay or frustrate final consensus by the committee. Accordingly, it was determined to be preferable to permit the committee to reach its own consensus and to publish its consensus recommendations, attributing them only to the committee. Any OMB or OSHA disagreements would be dealt with separately and reflected in a separate NPRM publication.

### *H. Mediation*

James R. Williams, an experienced mediator from the Federal Mediation and Conciliation Service ("FMCS"), was selected to serve as the facilitator for the MDA negotiation in its early stages. OSHA reimbursed FMCS for his services. The FMCS mediator did a certain amount of behind the scenes work encouraging and reinforcing committee members to divide into working groups and encouraging committee member when they became frustrated about the rate of progress of the committee.

Some kind of mediation or presiding role was essential.

Some committee members thought the skills of the MDA facilitator did not match the needs of the negotiation well. Because the mediator lacked personal knowledge of the technical issues in MDA health regulation and also lacked knowledge on administrative rulemaking, he was unable to help the committee focus its efforts on the most productive subjects, in the opinion of these committee members. Many times the Solicitor representative or the OHSA representative played the de facto presiding and mediation role. But other committee members said it was "a stroke of genius" to have a non-agency mediator, unencumbered with a position on the substantive issues. Because he did not intrude into substance, he was perceived as being fair and was more effective in facilitating trust and consensus, in the view of these committee members. In the view of some committee members, the mediator did a very effective job in promoting a shared sense of commitment to the committee's process. The effectiveness of this effort was exemplified when the UAW representative had to be replaced late in the committee's activities by a representative of the carpenter's union. The introduction of the carpenter's representative repolarized the committee to a significant degree.

An intermediate position was embodied in the suggestion that the mediator could have been briefed better before the negotiation on OSHA's mission, policy orientation, and on the legal constraints applicable. Some committee members perceived a change in the mediator's approach as the committee's work proceeded. Initially, the mediator was relatively passive, but eventually realized that some strong personalities on the committee would impede committee progress by forcing repeated and unnecessary caucuses unless he exerted more control.

Committee members, though not unanimous, thought the mediator should have pushed harder and been more task oriented. Some members of the committee felt that the mediator could have been more effective if his role had not been limited by the "eighth set" of the committee's ground rules. Those "restricted the authority of the mediator to interpreting the ground rules in the event of a dispute and making suggestions for the resolution of any issues. In restricting the authority of the mediator, the Committee members felt that, as a consensus building group, they should be responsible for their own schedules, set their own itineraries, and develop their own issues."[93]

## IV. OSHA PREPARATION FOR MEETINGS AND TECHNICAL SUPPORT

Generally, the first meeting of the committee could have been better prepared. Despite advance distribution of material by OSHA, some members of the committee were not altogether clear on whether the first meeting would focus on swearing in, development of committee ground rules, review of legal requirements, and setting of schedules and agendas for subsequent meetings, or whether the committee would get into substance. Some committee members suggested that the committee might have gotten off to a more effective start if OSHA actually had prepared a draft standard for the committee to work from. OSHA's inability to get draft standards language to the committee members ahead of meetings wasted committee time and prevented effective preparation by committee members who had not participated informally in writing new drafts. "Redlined" revisions, indicating deletions from and additions to prior language, would have been useful. Some committee members observed that it reflected poorly on the agency that contractor information was flawed and needed to be revised constantly. The committee members wasted time double checking the literature to make sure it had not been mischaracterized.

Underlying health effects data was provided on a piecemeal basis by OSHA. In one case, some 18 inches of documents, requiring several person months of review, was distributed only a few weeks in advance of the meeting to address health effects. Also, at the beginning of the committee's activities, a considerable volume of substantive information was provided at the meeting, and the meeting adjourned early because members were unprepared to address the subjects raised in the background material.

Some members felt that the committee could have got off to a more effective start if two types of information had been provided in a comprehensive form in advance. The first type was all of the basic background information that OSHA thought pertinent, on health effects, economics, and legal requirements. Second, OSHA could have provided in more coherent form its view about what the law requires and what OSHA policy militates. Much of the legal information, especially relating to rulemaking requirements, was provided interactively and orally by the Solicitor representative in response to questions or comments during committee sessions.

OSHA resisted two things that some members of the committee wanted to do: developments of certain part of the proposed NPRM through subgroups[94] and participation by health experts.

OSHA resistance to active participation by health experts apparently was based on agency concern that committee meetings would turn into a battle of the experts, as sometimes occurs in hybrid rulemaking hearings. This is a valid concern. Nevertheless, some members of the committee felt that actual give and take with health experts would have helped the committee narrow its focus. In one case an OSHA health expert appeared and made a presentation, but some committee members would have preferred more participation by experts affiliated with outside interests. Other committee members reframed the problem as involving inadequate access to physicians, rather than from toxicologists, who were represented on the committee itself.

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[93] 52 Fed.Reg. 26776, 26779 (July 16, 1987) (text of Committee recommendation, characterizing ground rules).

[94] See §VI(C)(2) for a discussion of the subgroup issue.

## V. FEDERAL ADVISORY COMMITTEE ACT

The MDA committee was an advisory committee under the Federal Advisory Committee Act, and the notice and open meeting requirements of that act were followed throughout the course of the committee's deliberations. No difficulties were occasioned by the open meeting requirement.[95] Attendance at the meetings of the committee averaged about a dozen people other than the committee members. Some committee members think it would be desirable to encourage even wider public participation, so that views that otherwise might be expressed at public hearings on an NPRM, or in litigation over a final rule, could be taken into account at the committee stage.

Some problems were experienced, however, because of the department's procedures for approving names of persons to be appointed to advisory committees. This approval process caused considerable delay before the committee began operations, and it also was a major barrier to prompt replacement of committee members who were prevented from participating actively in the committee's deliberations after the process began.

Also, one reason that the OSHA representative opposed subgroups was her belief that the committee charter, and ultimately the Federal Advisory Committee Act, prohibited such subgroups.

## VI. DEVELOPMENT OF CONSENSUS AND POST-CONSENSUS PROCESS

### *A. The Consensus Groundrule*

The objective of negotiated rulemaking is to reach "consensus" among the participants as to the content of the proposed rule. Harter characterized the definition of "consensus" as "one of the most difficult and complex questions in regulatory negotiation."[96] He concluded that experience was necessary before anyone could develop more concrete ideas on what consensus should entail, pointing out, however, that the existence of a consensus is more a matter of feel, than of mathematical calculation.[97]

The MDA Committee developed a sixth set of groundrules addressing consensus development:

> The sixth set of the ground rules defined concurrence as 75% of all votes cast, either affirmative or negative, but not including abstentions. This set also established procedures for members holding proxy votes.[98] . . . The Committee also decided that concurrence would be determined independently on each section of the standard rather than on the entire standard. Several of the Committee members disagreed with adopting this provision. One member representing employers' interests, and one representing the employees' interest, wanted to vote on the final recommendation (consisting of the various recommendations) made to the Secretary. The majority of the Committee members, however, felt that the task was not an "all or nothing" proposition and that

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[95] See Perritt, *supra* note 9, 74 Geo.L.J. at 1703 (discussion of potential problems resulting from Federal Advisory Committee Act open meeting requirement).

[96] Harter, *supra* note 21, 71 Geo.L.J. at 92.

[97] 71 Geo.L.J. at 93.

[98] See §III(A), discussing proxies.

whatever recommendations that the Committee made to OSHA, on any of the standard provisions, would be useful. Thus, the potential to withhold useful information obtained on an issue by issue basis because the entire package could not be agreed upon did not appear to be reasonable nor did it fulfill the "charge" rendered by Assistant Secretary Pendergrass. Thus the majority of Committee members agreed to accept concurrence on an issue by issue basis. The Committee did, however, agree that the dissenting vote of a Committee member would be made part of the recommendation made to the Assistant Secretary.

Members were given several voting options: to affirm the vote, dissent but provide rationale for disagreeing, abstain from voting, defer voting, render a conditional vote, and revisit an issue with cause. Early in the process, the Committee recognized that an interrelationship exists between many of the standard provisions. Furthermore, the Committee realized that the outcome or resolution of one issue often determines or limits the ability to compromise on a subsequent provision. Revisiting the definition of a regulated area, after determining the regulatory parameters of a regulated area is one example. Revisiting an issue or conditioning a vote allowed a member the necessary latitude to consider the interrelationship of provisions as the recommended standard took shape. In addition, as a result of pending regulations or policy considerations, allowing Committee members to abstain from voting when dealing with sensitive issues tended to facilitate the mediation process. It does not limit the exchange of ideas among unaffected Committee members or place the affected Committee member in an uncomfortable position. The Committee, however, agreed that an abstention from voting should not be used to determine a majority for voting purposes and that only positive and negative votes could form the basis of a majority vote.

The Committee also agreed that concurrence equals a majority vote when 75% of all votes cast, both positive and negative, are the same. This ground rule was by far the most significant compromise made by the Committee. Past mediated rulemaking efforts operated on a 100% majority vote before moving on to the next issue. It is nearly impossible to get everyone to agree on everything and thus the potential for impasse is great. In addition the 100% agreement provision often leads to "issue bargaining" which may lead to unfavorable "trade-offs". The Committee members unanimously agreed that the "unfavorable trade-off" or "lives bargaining" perception should be avoided at all costs. This ground rule allowed the Committee to proceed to the next issues without achieving 100% agreement, thereby forestalling both impasse and the need to bargain beyond the issue limit. While the potential to polarize votes and vote down particular interests still existed, the Committee made every effort to resolve a conflict and achieve a compromise even when it was apparent that a polarization of votes had occurred and that voting an interest down was plausible. In fact, the Committee voted unanimously on approximately 90% of the issues.[99]

The value of a flexible consensus rule cannot be emphasized too strongly. By providing for less than unanimity, and by providing for issue-by-issue consideration, the Committee ensured that the fruits of its deliberations could be communicated to OSHA even if it did not reach complete agreement on all aspects of a standard, and in doing so also created a subtle incentive to agree on a total package rather that risking that OSHA would adopt a committee recommendation on a single issue not favored by one or more represented interests. The consensus groundrule was a major creative step in avoiding one of the major problems that impeded the benzene negotiation.[100]

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[99] 52 Fed.Reg. 26776, 26779 (July 16, 1987).

### B. Development of Consensus

MDA negotiations concluded on May 22, 1987 with committee agreement on a consensus document that could, with OSHA approval, become the notice of proposed rulemaking. The OSHA representative was expected to clear up the language in the document and to clause it to be published in the Federal Register by the end of June as the consensus committee proposal. The committee expected that OSHA would, pursuant to its original Federal Register notice, either adopt the consensus recommendation substantially as its own notice of proposed rulemaking or justify any changes in the committee proposal reflected in the OSHA notice of proposed rulemaking. It was not, however, anticipated that the end of June publication of the committee consensus would itself be the OSHA NPRM.

Consensus was difficult to obtain because of some personality conflict and because of remaining disagreements between management and union interests. In addition, union representatives were stretched to deal with the technical detail involved in risk assessment and cost estimates. To some extent, eventual union acceptance of some of the technical analysis was based as much on trust of management representatives as on independent analysis.

There was some suspicion that some of the representatives, especially from the union side, where not enthusiastic about actually reaching consensus, preferring to deal with disagreements in other forums.

In the last committee meeting, the committee finally broke into subgroups, realizing that it would not complete its work functioning as a committee of the whole. The basic advantage of subgroups is that their group dynamics permitted greater efficiency, especially in editing drafts. The use of subgroups at the end of the negotiation, however, does not necessarily resolve the question whether their use earlier in the committee's deliberations would have promoted or delayed the committee's activities.

The mediator's philosophy, pressed upon the members of the committee at the end of the committee deliberations was that it would be better to finish the process rather than to produce a perfect document. This view was pressed aggressively on the members of the committee during the final week of deliberations culminating in the production of a consensus document.

### C. Committee Procedures Promoting and Retarding Consensus Development

#### 1. Drafting

In the view of some members, the full committee wasted time editing; some people are good at drafting; others are not. Some word discussions were important, most were not, involving minor semantic or style issues. It would have been better, under this view, to have established a drafting subgroup, or at least to have had a technical editor. Part of the problem was too many different drafts, not clearly identified as to date or sequence. It was a mistake, thought some committee members, automatically to incorporate suggestions of members into new drafts for the next meeting. It would have been better to discuss the suggestions, and then let the committee decide which should be incorporated. Sometimes the same point was debated three or four times. The OSHA representative would rewrite language to incorporate changes only to have the committee delete them. Obviously some of these criticisms are inconsistent with each other. Almost any large work group dislikes drafting, but also cannot resist the temptation to nitpick the work of a subcommittee or individual editor.

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[100] See Perritt, *supra* note 9, 74 Geo.L.J. at 1661-62 (explaining detrimental effect of benzene total package consensus protocol).

The most realistic accommodation of this problem is for the whole committee to build trust — and frustration with the time required for drafting as a committee of the whole — gradually inducing it to delegate drafting details to a subgroup or technical editor.

### 2. Subgroups

Development of standards and preamble language for committee consideration proceeded through an informal system of subgroups. Typically, the OSHA representative would synthesize committee discussion into draft language and circulate it to the committee. Only a few written comments would be received. She then would invite committee members representing major interests to work with her to redraft language.[101] The group draft then would be circulated in advance of the next committee meeting.

Formal subgroups were proposed by the mediator early in the committee's life, but opposed by the OSHA representative. Finally, in the last meeting of the committee, formal subgroups worked through remaining areas of disagreements over detailed language, enabling the committee to adopt a consensus document. OSHA's reluctance to have standards language developed in committee subgroups apparently was based on a fear that subgroups working without active OSHA involvement would not provide sufficiently detailed justification for approaches taken. Some members of the committee favoring greater reliance on subgroups acknowledged that without OSHA pressure, the committee consensus document probably would have been much more abbreviated, without the kind of detailed preamble language that explained the rationale for the committee's recommendation. The risk of this would have been that the committee consensus would be vulnerable to attack as simply reflecting the power of particular interests, especially industry interests.

Some committee members believe, in retrospect, that it would not have been useful to delegate work to subgroups earlier in the committee's work. Subgroups work only if the main group trusts members of subgroups. If the main committee just gets new draft language without working through the rationale itself,[102] it is not likely to accept it, unless it has great confidence in the people who put together the draft and knows that they considered everything the full committee would have considered. Subgroups worked at the end of the committee's deliberations when trust had developed and time was short, but they might not have worked earlier.

## *D. Post Consensus Process*

OSHA's original notice committed the agency to publish any consensus reached by the committee and to use the consensus as a basis for its NPRM unless there were good reasons to change it.

After consensus was reached in May, 1987, OSHA did publish the consensus recommendation without change on July 17, 1987, reserving its right to publish an NPRM at variance with the consensus recommendation.

> OSHA is publishing the following document which represents the work product of the Committee—a recommended

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[101] The Committee groundrule acknowledged the appropriateness of this procedure by recognizing "that 'off the record' discussions among the represented interests would be needed if decisions concerning issues 'at the bargaining table' were to be made," in the set of groundrules concerning OSHA's duty to provide negotiating and caucus rooms. 52 Fed.Reg. 26776, 26777 (July 16, 1987).

[102] Note the criticism in earlier in this part of the OSHA representative for simply incorporating suggested language changes without permitting the committee to discuss them.

> proposed standard for occupational exposure to MDA, including a complete regulatory text with supporting rationale. OSHA plans to use this document as the basis for its NPRM unless it is inconsistent with OSHA's statutory requirements or is otherwise unjustified. OSHA plans to publish this NPRM within 90 days.[103]

The Committee groundrules also addressed the post-consensus process:

> The final set of ground rules involved OSHA's responsibility to the Committee. The Committee agreed that the final product of the mediation process would serve as the basis for the Committee's recommendations for a proposed rule regulating occupational exposure to MDA. OSHA agreed to publish within 90 days of the close of the mediation process its own notice of proposed rulemaking. OSHA however, agreed to use the Mediated Rulemaking Advisory Committee's report as the basis for its Notice of Proposed Rulemaking (NPRM), except for any provision it found inconsistent with OSHA's statutory requirements or otherwise unjustified. The Agency accepted the burden of justifying any deviation in its proposed rule from the Committee's recommended standard. OSHA also agreed to publish a final rule within 180 days after the issuance of its proposal or after the certification of any hearing record. In addition, the Committee realized that these mediated rulemaking efforts would not replace the need for OSHA to adhere to traditional rulemaking procedures.[104]

From the outset, OSHA made it clear that the final rule would be promulgated only after notice and comment and hybrid rulemaking proceedings on the NPRM according to the requirements of APA and OSHA Act. It is anticipated, however, that the committee would be reconvened to react to any changes between the committee consensus document and the NPRM. The committee might also be reconvened to consider public comments received on the NPRM.[105]

The procedure followed by OSHA gave the public access to the evolving rule proposal at three points in time,[106] as compared with the two opportunities envisioned by ACUS recommendation 85-5.

## VII. EVALUATION AND CONCLUSIONS

The most important conclusion inferable from the MDA negotiated rulemaking effort is that OSHA can use negotiated rulemaking successfully. An OSHA project officer worked directly with affected interests and put together a complex health standard without substantial disruption or alteration of normal agency operating procedures. That MDA was treated by the agency to a great extent as "just like any other health standard" and the MDA negotiation nevertheless produced consensus is testimony to the utility and flexibility of the negotiated rulemaking process.

Some other conclusions, especially those related to OSHA support, are based on conflicting data. It is difficult to know what conclusions validly can be drawn from differing or conflicting reports and perceptions. The problem is not that someone's perception is wrong; the problem is that the commentators on any process have different backgrounds and different competing demands on them. The following overall conclusions seem reasonably inferable from the data:

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[103] 52 Fed.Reg. 26776, 26776 (July 16, 1987) (introductory statement by Assistant Secretary Pendergrass).

[104] 52 Fed.Reg. 26776, 26779 (July 16, 1987).

[105] The possibility of reconvening the committee was not mentioned in the consensus document published in the Federal Register, but it was discussed informally with OSHA and Departmental personnel and has clear precedent from the FAA and experience. See Perritt, *supra* note 9, 74 Geo.L.J. at 1671 (FAA committee met to consider comments received on NPRM).

[106] By permitting the public to attend committee meetings, by publishing the consensus recommendation, and by publishing an NPRM.

First, the committee never would have reached consensus without the unique commitment of the OSHA representative.

Second, the mediator was not sufficiently task oriented, and did not push hard enough. Some of this problem disappeared toward the end of the process, and some of it was due to the energy of the OSHA representative in taking on some functions that could have been performed by the mediator.

Third, the way the OSHA representative wanted to control OSHA resource commitments was inherently inconsistent with the functioning of a structured and hierarchical organization.

Fourth, OSHA was not able to function effectively in support of the MDA process through regular channels and the chain of command, due to a combination of mistrust, fear of the loss of accountability to a rule negotiation committee, inadequate resources, and poorly motivated support personnel.

### *A. The OSHA Support Problem: Tension Between Ad-Hoc Demands of MDA Negotiation and Orderly Management of OSHA Organization*

There is an inherent tension between the *ad hoc* nature of negotiated rulemaking and the orderly management of a regulatory program. Some of the ways in which this tension was manifested in the MDA negotiation reinforces the conclusion that the Department of Labor should institutionalize the negotiated rulemaking activity to a greater degree. The Department should support development of sound and stable management and organizational procedures within all of its operating agencies, including OSHA. But it also should recognize the value of negotiated rulemaking as an alternative to traditional processes. Accordingly, institutional mechanisms should be found that are hospitable to the *ad-hoc* nature of negotiated rulemaking, while minimizing the disruption to accountability, chain of command, and orderly resource planning and allocation within the ongoing components of the Department's agencies. One idea for institutionalization is addressed in Part IX of this report.

The management of the health standards function at OSHA was put in a difficult position by the demands for additional resources raised by the MDA negotiations. The management acknowledges that there were problems of administrative support and travel reimbursement.

OSHA has been battered too much. It is not constructive to take further shots at the agency, without trying to illuminate the legitimate problems OSHA workers and managers have.[107]

Many members of the committee complained about unreimbursed travel expenditures. Part of the problem with travel reimbursement was that the agency originally intended that committee members would not be reimbursed by the government for travel if their employing organizations were willing to pay for the travel. At the first meeting of the committee, however, travel vouchers were distributed to all committee members, naturally raising the expectation that everyone would be reimbursed. Then, committee members were not briefed properly on government travel regulations, leading them to expect reimbursement for expenditures that were not adequately documented or which could not be reimbursed consistent with law. In addition, much unnecessary confusion was occasioned by a process of sending GTR's to committee members in advance, which necessitated changes as travel plans changed.

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[107] *See generally* McGarity & Shapiro, Report from the Office of the Chairman, Administrative Conference of the United States to the Assistant Secretary for Occupational Safety and Health Administration on OSHA Rulemaking Procedures (Feb. 19, 1987) [hereinafter "ACUS OSHA Report"].

A better process would have been to cause the agency's travel agency simply to authorize committee members to pick up tickets at points of departure.

Administrative support for the MDA negotiation presented the following conflicting values. The committee and the agency representative on the committee naturally preferred to command resources directly. If the committee wanted something retyped or reproduced, it wished to control the work directly without having to go through channels. Conversely, a manager of OSHA resources naturally needs to have an orderly process for planning and allocating resources. OSHA management was unwilling to permit a person within its organization who was not a manager to pick and choose, commandeering resources that might have been allocated to other tasks within the organization's responsibility. It is the position of Health Standards Management that there was an open invitation for the committee or the OSHA representative thereon to request additional resources and that they would have been provided. Yet, they never were requested. The perception, probably not all that far off the mark, is that the OSHA representative instinctively did something herself rather than risking making a request through channels which might not produce results only after time had been lost making the request. The OSHA representative refused resources that, in her view, could not perform satisfactorily. When requests for other, more suitable, help were rebuffed, she quit asking and did the work herself.

Also, intermediate managerial personnel were unwilling to have the OSHA representative deal directly with the policy level of OSHA without keeping intermediate supervision informed. Yet the OSHA representative naturally would have preferred to deal directly with the Assistant Secretary, and had the occasion presented itself, with the Secretary.

It is difficult to reconcile these competing interests in any ongoing organization. It is all the more difficult if the total amount of available resources is insufficient and if morale is low. Both the insufficiency and the morale problem are pervasive at OSHA.[108]

Another manifestation of the difficulty was the perceived need of the committee and the OSHA representative to have a separate room for committee telephone contact, and document preparation. Such a room was established, and many committee members found in the room and a special telephone line symbolic recognition that OSHA recognized the importance of the rule negotiation. Yet OSHA management felt that the separate room reduced accountability and presented major risks for confusion and disorder. It would be better, in the view of OSHA management, for the support functions to be handled through the regular organization.

### *B. Costs and Benefits of Negotiated Rulemaking*

#### 1. Benefits

As one participant put it, it is too early to tell if the negotiation approach was "successful." Success depends on a reduction of controversy at any hearing on the NPRM and on a reduction of post final-rule litigation. By this test, the negotiation cannot be evaluated fully for many months or years.

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[108] See ACUS OSHA Report *supra* note 107, at xvi.

Several committee members thought that the face-to-face nature of the rule negotiation was beneficial because the interest representatives discovered that they were not all that far apart. They were able to work out problems based on greater knowledge of some particular problem, rather fighting over principle. Disagreements over principle tend to be magnified in traditional hybrid rulemaking hearings. Negotiated rulemaking permits the agency to say to a representative who objects to a particular regulatory approach, "Well, how would *you* solve it, if not this way?"

One of the more subtle benefits of the effort was that the acceptability of the ultimate standard, whatever it may be, has been enhanced. By participating on the committee, the major interests feel that any standard emerging from the process is more legitimate, especially to the extent that it takes into account their concerns. Equally important, committee members gained appreciation for the rationale for the positions taken by opposing interests.

Another benefit was that committee members gained access to important data that had not been published. In the view of one committee member, the committee deliberations probably will result in publication of some important data that otherwise would not have been published and therefore not been in the public domain. The willingness of represented interests to disclose some of this data was enhanced by the trust developed during the negotiation process.

## 2. Costs

Some controversy exists within OSHA — and will probably continue to exist — about the relative cost of negotiated rulemaking compared with traditional hybrid rulemaking. Data is being collected by OSHA as to the total cost of the MDA negotiation. But these data will not resolve the controversy, because it is so difficult to measure the total cost of traditional rulemaking procedures. Regardless of the conclusions reached, it is appropriate to consider several different cost factors: travel and meeting or hearing facility costs, document preparation and reproduction costs, government personnel costs. Each of these cost categories should be considered as to the pre NPRM phase, the phase between publication of the NPRM and the promulgation of the final rule, and in connection with any post final rule judicial review. In addition to dollar costs, one should consider the time required to make a rule under traditional hybrid procedures as compared with the time required under negotiated rulemaking procedures. It is the impression of the participants in the MDA negotiation that an NPRM was produced much more quickly than it could have been through traditional OSHA procedures. Major cost and time savings are likely if the rule negotiation process reduces the number and scope of comments submitted on the NPRM and if it reduces or eliminates judicial challenges to the final rule.

A cost reducing effect of the negotiation process was that the agency got the benefit of the views of affected interests before developing a detailed proposal. This substantially reduced the amount of work and rework on detail regulatory language. Moreover, in the MDA negotiation, the agency got some free economic and technical analysis because the members of the committee were willing to provide it as a part of their participation. If the MDA NPRM had been developed through the traditional hybrid rulemaking processes, OSHA probably would have had to pay for at least the economic analysis by hiring a consultant. Several committee members emphasized the amount of "free" technical analysis performed by CMA staff for OSHA in conjunction with the committee's activities.

# VIII. RECOMMENDATIONS

1. *The MDA process for defining representation of affected interests should be used as a model.* Future negotiated rulemaking efforts should follow the basic concept for representation used in the MDA negotiation. Labor, Industry, regulatory agency representatives should be joined by professionals with expertise in the subject matter of the rule.[109] Two goals should be served by the membership composition: representing affected interests effectively, and marshalling the necessary expertise. Committee consensus will not reduce subsequent administrative and judicial litigation if major interests are not represented,[110] and the consensus will be of poor substantive quality if expertise is lacking. The occasional need for other expertise can be satisfied by establishing task forces not necessarily limited in membership to committee members to address certain issues and report back to the committee.[111]

The procedure used to define committee membership also was sound: an initial federal register notice with a list of interests and potential representatives the agency had identified, followed by an opportunity for others to make the case why they also should be afforded membership.

2. *The agency representative on a negotiated rulemaking committee should be committed, energetic and creative.* Regardless of the amount of administrative support available, the position of an agency representative is tricky. The representative's personality must be suited to searching for new ways of solving problems, thereby permitting the representative to play an ad hoc mediation role. Also, some prior training seems desirable in the negotiation and mediation processes to help representatives even with appropriate policy traits and instincts. As an agency does a greater number of rule negotiations, agency expertise will increase on how to refine the process and accommodate the unique features of specific negotiations.

3. *Committee members should have commitment.* All interest representatives participating in a mediated rulemaking must have a commitment to see the process through. A serious impediment to effective functioning of the MDA committee was the low level of participation by some of the union representatives, especially the UAW representative. Other members pointed out, however, that all the union representatives did a reasonably good job of participating, given their other responsibilities.

4. *A system of committee alternates should be considered.* If the department's main clearance process continues to be imposed on rule negotiation committees, it is appropriate that future committees be constituted with a formal set of alternate members for each interest who would take the place of any member who becomes unable to continue. The names of alternates would be approved at the same time the name of the regular committee members are approved. Alternates, somewhat like alternate jurors, would attend all committee meetings but would be entitled to contribute and to vote only if a member becomes unable to continue.

Some MDA committee members recommended that a system of alternate selection at the beginning of the negotiation, so that persons would have been available to serve in the place of an absent committee member without the delays associated with the name clearance process. Other committee members were skeptical of the utility of a system of alternates. If a system of alternates were to be used it is important that the alternates attend every meeting, voting only when the principal is absent. Otherwise, an alternate coming in cold would require review of committee deliberations to date at considerable cost to committee progress. Members who are skeptical of the alternate proposal point out that everyone made a commitment at the beginning of the process, identifying monthly meeting dates for a seven-month period. The problem was that several of the union representatives did not live up to their commitment to take an active part in the committee's activities. Pre-arranged alternates would lead to two problems, in the view of these members. First, the temptation would be strong for principals to send alternates, gradually reducing the committee activities to the alternate level. Second, alternates who had not been part of the give and take of the committee could not simply step in at one meeting and play an effective role. The suggestion that alternates, once selected would, like alternate jurors, attend all committee meetings mitigates the second of these problems. Other members suggested that alternates should be identified so that their names could be cleared in advance, but that they would not become active participants unless a principal member had to withdraw altogether from the committee.

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[109] In the case of the MDA negotiation, the professionals with requisite expertise were health professionals.

[110] See Perritt *supra* note 9, 74 Geo.L.J. at 1709 (explaining that an interest entitled to be represented is one that has the power and will to challenge the resulting rule).

[111] Such task forces must be used carefully to avoid fragmenting the committee effort and distorting the committee membership balance.

*5. Future rule negotiations should provide for mediation.* Future DOL negotiated rulemaking processes should, like the MDA negotiation, include a mediator — probably from outside the agency making the rule. The process negotiated rulemaking process will not work without an effective neutral. Except in the most unusual circumstances an agency employee would not be perceived as having the requisite neutrality.[112] Even if an individual agency employee designated as mediator preferred to remain strictly neutral, such an employee almost certainly would be subject to a certain degree of influence or pressure from the employing agency or departmental offices and therefore would find it difficult to operate in a truly neutral fashion.

Conceivably, a mediator from DOL, outside the sponsoring agency, could serve effectively as a mediator. For example, many MDA committee members believe that a mediator from the Solicitor's Office would have been accepted by the committee. Or, a person who had served effectively as an agency representative in one rule negotiation might serve successfully as a mediator in a rule negotiation sponsored by another agency. It is appropriate to experiment. Mediation skills are essentially personal, requiring expertise on administrative rulemaking, efficient presiding officer skills, and good interpersonal and group dynamics skills. Mediation skills are not commonplace, however, and it is a serious mistake to believe that anyone who is friendly and knows substance can step into a mediation role. Being a good mediator requires much experience and much knowledge about how people interact and how groups resolve differences among their members.

*6. The MDA Committee protocol is a good checklist for other committees but should not be imposed involuntarily by sponsoring agencies or followed rigidly by committees.* The MDA committee protocol, developed at the first meeting, is a good example of how negotiation committees should organize themselves. The MDA protocol also was creative in the way it defined consensus and worked out voting and issue-by-issue decision making. This particular resolution of such issues may not work for all committees, however.

*7. Negotiating committee resources should be managed more effectively, and the sponsoring agency must commit adequate resources at the outset of the negotiation.* As one member of the MDA committee put it, "OSHA must decide if it wants to use this process. If it does, it must commit the resources." Another member said, "I would never serve on another OSHA committee unless I have a full commitment of OSHA support." Both of these commentators were supportive of the negotiation process and hoped that the Department of Labor would use it frequently in the future. A continuing difficulty with committee operations involved obtaining resource commitments for transportation, meeting rooms, and other expenses. Some committee members said the most important single improvement would be for the Office of the Secretary to take responsibility for providing administrative resources. It would be desirable if the neutral could have authority over resources, possibly by committing a pool of resources from the department and giving the neutral authority to obligate those resources. A negotiation committee should have its own office and telephone service.

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[112] See ACUS Recommendation 85-5, 1 C.F.R. §305.85-5, para. 5.

*8. Agency preparation for negotiating committee sessions should be improved.* The MDA negotiation would have worked better if at the beginning, the OSHA representative or mediator or both had provided the committee with a summary of the legal requirements for rulemaking of the type involved in the MDA standard. Many of the committee members were not familiar with the legal requirements of rulemaking and periodically were confused as to what would be permissible and not. Some members felt that the committee could have got off to a more effective start if two types of information had been provided in a comprehensive form in advance. First, the sponsoring agency should provide all of the basic background information that the agency thinks pertinent, on health effects,[113] economics, and legal requirements. In general, the sponsoring agency should do its homework to develop data and put it in an understandable form before a committee begins to meet. At least some committee members believe that the agency should provide the committee with a complete, quality, draft document instead of taking a piecemeal approach. It would be desirable to prepare "red-lined" revisions, as a committee's work proceeds, indicating deletions from and additions to prior language. An alternative is to establish an "electronic bulletin board," that committee members could access.[114]

Second, sponsoring agencies should provide coherent guidance about their view of what the law requires and what agency policy militates. Much of this information, especially relating to rulemaking requirements, was provided interactively by the Solicitor representative in the MDA negotiation.

*9. A significant portion of committee meetings should be held away from Washington, and away from the Department of Labor.* Meetings at Department of Labor facilities in Washington are unsatisfactory because the air conditioning is turned off at 5:00 P. M., and support is difficult to arrange. Meetings at other locations in Washington can be better, but nevertheless tend to force the committee meeting into a 9-to-5 mold, since so many members are likely to be from the Washington area. Out-of-town meetings create more opportunity for serious mediation extending beyond the regular working day, and for development of greater trust among committee members through social contact.

*10. Facility tours for committee members are desirable.* Several MDA committee members recommended at least one plant tour for any health or safety standards negotiation committee. Most members of the MDA committee felt that more visits to facilities in which MDA was used would have been useful. Facility visits serve two purposes. First, they gives committee members a shared set of perceptions and experiences, which enhances trust and communication. Second, they permit committee members to focus on real world problems as opposed to extrapolating from textbook or theoretical perceptions. Many members of a committee will not have a concrete idea of the nature of the risk, or the feasibility of remedial steps. A committee should have one meeting to establish the committee's operating protocol, and follow that meeting with at least one plant tour, more than one if there are significant differences in plant configuration or operating practices.

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[113] Or, other effects, in the case of an agency with another mission.

[114] See Recommendation 15.

11. *Subgroups should be considered and utilized to the extent, and when, the committee decides.* Subgroups may be desirable from the outset of a rule negotiation. The full committee cannot draft effectively. The MDA negotiating committee, though it rejected the idea of subgroups in its first meeting, could not have completed its work without delegating some of the details to subgroups. The basic advantage of subgroups is that their group dynamics permit greater efficiency, especially in drafting. But subgroups are unlikely to be effective until committee members trust each other. Each committee must move at its own pace.

12. *A source of technical analysis must exist.* Either an interest like CMA will have to be willing to do a substantial amount of technical analysis for the committee, the agency must be prepared to do much more of it, contractors must be arranged, or the committee will move more slowly.

13. *Minutes of meetings should be provided.* Someone (other than the agency representative) should be available to take minutes of committee meetings[115] and to distribute them promptly after meetings. The availability of minutes facilitates committee member review of draft documents, and forestalls recreating earlier discussions at subsequent meetings. Alternatively, the sponsoring agency should hire a court reporter so that a verbatim transcript can be made of committee meetings. Use by a court reporter of modern transcript production technology, permits microcomputer software to generate a transcript immediately from stenotype keyboard input. The availability of a transcript would facilitate preparation of post-meeting documentation and draft language. The traditional concern about transcripts, that they may chill candid discussions, is mitigated by the fact that the meetings are open to the public.

14. *A microcomputer should be made available to negotiation committees.* Computers capable of running word processing or analytical software can be helpful because they permit redrafts or portions of a draft rule to be generated during committee sessions and printed immediately for committee member use. In addition, a large video screen should be available to display text from the word processing software running on the computer so the entire committee can see it at the same time. As changes in language are suggested, they can be entered on the keyboard and displayed immediately on the screen. It also is desirable to have an administrative/clerical person to operate the microcomputer. It is distracting for the agency representative to operate the computer, while also trying to fulfill substantive responsibilities.

15. *Agencies should consider distributing committee materials in electronic form.* The administrative burden of Xeroxing and mailing documentation to committee members could be reduced if drafts were distributed on diskettes and if all committee members have suitable equipment to transfer files from the diskettes directly into their word processing systems. Alternatively, current drafts of committee documents could be maintained on an electronic bulletin board by the sponsoring agency, accessible by ordinary telephone lines to committee members.[116] In addition, use of

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[115] The Federal Advisory Committee Act requires that minutes of covered advisory committee meetings be taken.

[116] The author presently is engaged in an investigation for the Administrative Conference of the United States on the use of such technology by other agencies, including the Securities and Exchange Commission, the Federal Maritime Commission, the Internal Revenue Ser-

"redlining" software by the sponsoring agency would indicate deletions and additions to earlier drafts of committee documents.

*16. The post consensus process anticipated for the MDA consensus recommendation is a good model for other rule negotiations.* Publication of committee consensus separately from an NPRM based on the consensus recommendation is appealing because it ensures prompt formalization of any consensus without risking erosion of the consensus because of difference or delays within the agency. Separate publication of the consensus recommendation reinforces the agency's commitment not to issue an NPRM different from the consensus recommendation unless the agency can articulate an appropriate basis for making changes. Presumably the validity of agency changes according to this criterion would be reviewable under the arbitrary and capricious standard of §706(2)(A) of the APA.

## IX.
## INSTITUTIONALIZING NEGOTIATED RULEMAKING

Negotiated rulemaking like that used to develop a proposed MDA standard is a major component of the Secretary's Regulatory Improvement Initiative.

As §VII(A) of this report noted, there is an inherent tension between the *ad hoc* nature of negotiated rulemaking and the orderly management of a regulatory program. The Department of Labor should support development of sound and stable management and organizational procedures within all of its operating agencies, including OSHA. But it also should recognize the value of negotiated rulemaking as an alternative to traditional processes. Institutional mechanisms should be established that are hospitable to the *ad-hoc* nature of negotiated rulemaking, while minimizing the disruption to accountability, chain of command, and predictable resource planning and allocation within the ongoing components of the Department's agencies.

This part of the report proposes a pilot program to afford the Department's agencies greater assistance and guidance in considering the use of this process.

### A. The Need for Departmental Assistance

A significant literature on negotiated rulemaking has developed, including the ACUS recommendations, the ACUS reports, and this report, explaining the implications of various approaches to the process and offering guidance to agencies on how to manage a rule negotiation. The ACUS recommendations contain criteria for selecting subjects for rule negotiation. The Federal Advisory Committee Act and implementing regulations channel the establishment of a negotiating committee.

While the exact form and structure of a rule negotiation must be tailored to the nature of the disagreements about a possible rule, to the characteristics of the affected interests, and to the desires of the agency and of outside interests, some mechanical aspects of the process can be accomplished more efficiently by borrowing forms and procedures successfully used by other agencies within the Department and elsewhere. Clear examples are the Federal Advisory Committee Act charter, the initial Federal Register notice of intent to consider negotiated rulemaking, and the steps to be followed by a "convenor" or mediator[117] in

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vice, and the Nuclear Regulatory Commission.

[117] Convenors and mediators play different roles in negotiated rulemaking. Convenors assist agencies in deciding whether a particular subject is suitable for negotiated rulemaking. They determine who are the affected interests and informally contact those interests to explore their willingness to participate in a negotiation. 1 C.F.R. §305.82-4 Paragraph 4 (1986). Mediators

identifying affected groups and exploring the willingness to participate in a negotiation.

DOL agencies should have available to them a central clearinghouse of information and a central source of advice on how to proceed to consider and to utilize negotiated rulemaking in appropriate cases.

An outline of such a clearinghouse operation follows. It contemplates setting up such an operation on a pilot basis in the Solicitor's Office, which already has responsibility for advising DOL agencies on rulemaking processes.

## *B. Proposed Pilot Program*

### 1. Summary

The Solicitor of Labor would establish a temporary unit under the direction of an Associate Solicitor or Special Assistant to the Solicitor to assist DOL agencies with use of mediated rulemaking.

### 2. Functions

The new office would have the following functions:

a. Keep DOL agencies informed about the potential advantages of mediated rulemaking and about the experiences of other agencies in using the process.

b. Review accounting and budget policies and procedures to ascertain whether changes are appropriate to remove incentives to use traditional adversarial processes instead of consensus-oriented processes.

c. Assist DOL agencies in evaluating the suitability of particular subjects for negotiation.

d. Maintain a list of internal and contractor personnel who are qualified to serve as convenors.

e. Supply, on a 50-50 cost sharing basis, qualified "convenors" for agency use.

f. Assist agencies in evaluating the qualifications of agency-proposed convenors.

g. Maintain standard documentation and tailor for use in specific cases:

   i) Federal Register notice of intent to use rule negotiation.

   ii) Advisory committee charter.

   iii) Documentation to clear names of proposed negotiation committee members.

h. Provide legal advice (in conjunction with other SOL offices) on the place of mediated rulemaking under the Federal Advisory Committee Act and the Administrative Procedure Act.

i. Assist DOL agencies in identifying facilitators/mediators

j. Maintain a list of internal and contractor personnel who are qualified to serve as mediators; consult with agencies on mediator selection; and evaluate, in conjunction with agencies, mediator performance.

### 3. Staffing and Resources

a. Two FTE's should be added to the Solicitor's office to support the activity. In filling the positions, consideration would be given to temporary appointments of per-

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become involved in the actual negotiation, helping the parties to agree on a procedure and to narrow their substantive differences. See 1 C.F.R. §305.82-4 Paragraph 10; §305.85-5 Paragraph 5 (1986). "Facilitator" is just another name for a mediator. Sometimes using the word "facilitator" instead of the word "mediator" reduces anxiety experienced by those who object to the idea of using a labor-management negotiation model for administrative rulemaking.

sons from law firms or consulting firms who have expertise in mediated rulemaking.

b. An appropriation account should be established to support expenses of the convenor process. The new activity would control expenditure of funds from this account.

c. After a regulatory issue has been identified as suitable for mediated rulemaking, the responsible agency would provide financial support for the mediator and for necessary travel and meeting expenses by establishing a 22-digit appropriation code. The new activity would have authority to obligate money under these codes.

# The Theory and Practice of Negotiated Rulemaking

**Lawrence Susskind†**
**Gerard McMahon††**

Scholars, government officials, and practitioners have expressed concern over the weaknesses of the federal rulemaking process and the time it often takes to promulgate rules. Given the many instances in which rules have been challenged in court, both the process of rulemaking and the regulations produced seem to have lost legitimacy in the eyes of many regulatees.

Since the late 1970's, advocates of negotiated approaches to rulemaking have argued that the legitimacy of proposed rules could be restored—and time-consuming court challenges avoided—if informal, face-to-face negotiations were used to supplement the traditional review and comment process. Critics, however, have responded quite negatively to what they perceived as the dangers of "deal-making behind closed doors." Nevertheless, proponents of the innovation have persisted, and during the last few years several federal agencies have experimented with negotiated approaches to rulemaking.

The Environmental Protection Agency (EPA) has undertaken the most elaborate tests of the concept. EPA's experiences shed new light on the advantages of negotiated rulemaking and suggest that some of the concerns of the critics have been misplaced. This article examines the results of the EPA demonstrations in order to test the models of negotiated rulemaking advanced by advocates, to respond to the concerns of critics, and to inform and improve the provisional theory. With the refinements suggested in this article, EPA's approach to negotiated rulemaking appears to hold great promise for remedying the crisis of regulatory legitimacy.

## I. Negotiated Rulemaking as a Regulatory Reform

Almost all the parties involved in federal rulemaking—business associations, public interest groups, and many government officials—complain about the time and expense involved in developing and

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implementing regulations.[1] Businesses assert that delays are costly and increase the uncertainty surrounding investment decisions.[2] Advocacy groups complain that litigation delays implementation of important rules.[3] Each party tends to think that the agency favors the others.[4] Agency officials, on the other hand, feel that their autonomy has been unreasonably limited by procedural requirements mandated by Congress and the courts.[5] Courts, however, are inappropriate as final arbitrators of technically complex regulatory disputes. Many judges fear "government by the judiciary" and admit their inability to cope with complex technical issues.[6]

These groups would certainly be less troubled if they believed that the conventional rulemaking process generated rules responsive to their interests, but few are satisfied with the time it takes to enact rules, the cost involved, or the quality of the rules produced.[7] In a speech delivered shortly before he left EPA, former Administrator William Ruckelshaus estimated that more than 80% of EPA's rules are challenged in court and that approximately 30% of the Agency's rules are significantly changed as a result of litigation.[8]

How did this situation develop? The roots of the problem can be found in the evolution of the regulatory process and in the changing nature of the issues that the process has been forced to address during the past several decades. Agency rulemaking from the New Deal to the early 1960's was characterized by broad deference to agency expertise and discretion. By the late 1960's, however, the groups being regulated, the newly emergent environmental advocacy organizations, and the courts had become unwilling to let such discretion go unchallenged.

Federal regulations typically are developed under procedures defined by the Administrative Procedures Act of 1946.[9] Using in-house expertise and informal individual meetings with stakeholders (parties who are interested in or will be affected by the rule), an agency such as EPA first develops a Notice of Proposed Rulemaking, which is published in the *Federal Register*. Non-agency stakeholders, such as businesses or environmental organizations, are then able to respond by adding to a rulemaking record through a formal public comment process. Oral hearings are permissible but not required. The agency must base the final rulemaking on a consideration of the record, although in addressing ambiguities and uncertainties in the record it may make policy choices where necessary.[10]

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[1] Morgan, *Towards a Revised Strategy for Ratemaking*, 1978 U. Ill. L.F. 21, 21-22 (1978); Note, *Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking*, 94 Harv. L. Rev. 1871 (1981).

[2] W. Ruckelshaus, Environmental Negotiation: A New Way of Winning, Address to the Conservation Foundation's Second National Conference on Environmental Dispute Resolution 3 (Oct. 1, 1984) (on file with the *Yale Journal on Regulation*).

[3] *Id.* at 14.

[4] Harter, *Dispute Resolution and Administrative Law: The History, Needs, and Future of a Complex Relationship*, 29 Vill. L. Rev. 1393, 1404 (1984).

[5] W. Ruckelshaus, *supra* note 2, at 2.

[6] *See, e.g.*, Bazelon, *Risk and Responsibility*, 205 Science 277, 278 (1979); Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. Pa. L. Rev. 509, 541-42 (1974).

[7] Harter, *Negotiating Regulations: A Cure for Malaise*, 71 Geo. L. J. 1, 6 (1981) [hereinafter cited as *Cure for Malaise*]; S. Breyer & R. Stewart, Administrative Law and Regulatory Policy 592 (2nd ed. 1985).

[8] W. Ruckelshaus, *supra* note 2, at 2. Ruckelshaus also noted the tremendous amount of time consumed by litigation over agency rules. He estimated that, each year, handling litigation from rulemaking challenges requires approximately 50 person-years from EPA's Office of General Counsel, 75 person-years from the EPA program offices, 25 person-years from the Department of Justice, and 175 person-years on the part of the plaintiffs' counsel. *Id.*

Many of the regulations promulgated over the past two decades have involved the resolution of complex factual questions.[11] More importantly, they have required difficult policy decisions that, at times, have lacked an operable political consensus.[12] If all regulations had a clearly determinable factual basis, arguments about the exercise of agency discretion would be moot. Agencies, however, must also make policy choices in situations where either the desired facts are not available or the available "facts" are contested. In such situations, the agency exercises considerable discretion as it interprets inconsistent facts, balances various and often competing interests, and ultimately makes subjective policy choices with very real economic and political ramifications. In this context, an agency can expect opposition to almost every rule it develops.

Congress, the White House, and the courts have explored a variety of strategies to forestall concerns about the exercise of agency discretion and to increase agency accountability. However, the government's efforts to limit discretion have increased the time and cost involved in rulemaking. Congress has enacted the Federal Advisory Committee Act (FACA),[13] the Sunshine Act,[14] the *ex parte* prohibitions of the Administrative Procedure Act,[15] and the Freedom of Information Act.[16] In issuing Executive Orders

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9. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559, 701-706 (1982)).

10. *See generally* Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1978) (a discussion of agency discretion in rulemaking).

11. Harter, *The Political Legitimacy and Judicial Review of Consensual Rules*, 32 AM. U.L. REV. 471, 473 (1983) [hereinafter cited as *Consensual Rules*]; Susskind & Ozawa, *Mediating Public Disputes: Obstacles and Possibilities*, 41 J. SOCIAL ISSUES 151 (1985).

12. Harter, *Consensual Rules, supra* note 11, at 474.

13. 5 U.S.C. §§ 1-15 (1982).

14. 5 U.S.C. § 552b (1982) (requires the agency to hold open meetings for most types of proceedings).

15. 5 U.S.C. §§ 554(d), 557(d) (1976) (prohibits *ex parte* contacts during formal rulemaking and adjudication).

16. 5 U.S.C. § 552 (1982 & Supp. II 1984) (requires agencies to make available to the public agency rules, opinions, orders, records, and proceedings).

12,291[17] and 12,498,[18] the White House has given the Office of Management and Budget (OMB) greatly expanded responsibility for reviewing the probable cost-effectiveness of proposed regulations. Since 1970, the courts have expanded judicial supervision of agencies by broadening the rules of standing,[19] issuing more specific criteria regarding the development and use of a factual record,[20] expanding notice and comment requirements,[21] and expressing a willingness to take a "hard look" at the reasonableness of proposed regulations.[22] These changes have produced "hybrid rulemaking,"[23] so-called because it is intermediate between the informal notice and comment rulemaking and formal procedures which include evidentiary hearings.[24]

While these developments have increased agency accountability, they have not fully responded to concerns about the legitimacy of regulatory actions. Limiting the role of non-agency participants to adversarial challenges to the rulemaking record has been an ineffective means of building support for the policy choices that agencies have had to make. The current rulemaking process is bound to generate dissatisfaction as long as regulatory agencies retain the exclusive responsibility for making the technical judgments and political compromises needed to develop a rule. By encouraging and empowering regulatees to challenge agency decisionmaking in an effort to enhance the political legitimacy of the rulemaking process, Congress and the courts have simply increased the complexity, cost, and time it takes to generate rules that can be implemented.

A number of scholars have suggested negotiated rulemaking as a response to these problems of delay, increased cost, and loss of political legitimacy.[25] In negotiated rulemaking, an agency and other parties with a significant stake in a rule participate in facilitated face-to-face interactions designed to produce a consensus. Together the parties explore their shared interests as well as differences of opinion, collaborate in gathering and analyzing technical information, generate options, and bargain and trade across these options according to their differing priorities. If a consensus is reached,[26] it is published in the *Federal Register* as the agency's notice of proposed rulemaking, and then the conventional review and comment process takes over. Because most of the parties likely to comment have already agreed on the notice of proposed rulemaking, the review period should be uneventful. The prospects of subsequent litigation should be all but eliminated.

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[17] Exec. Order No. 12,291, 3 C.F.R. 127 (1982). *See generally* Whittington & Grubb, *Economic Analysis of Regulatory Decisions: The Implications of Executive Order 12291*, 9 SCI. TECH. & HUM. VALUES 1 (1984).

[18] Exec. Order No. 12,498, 50 Fed. Reg. 1036 (1985).

[19] *See, e.g.*, United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973) (finding a tenuous claim of injury from regulatory action sufficient to establish standing). *See generally* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 24 (1983).

[20] *See* Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974) (ordering EPA to explain scientific basis used to support promulgated standard and respond to the industry's technical objections to standards).

[21] *See* 1 K. DAVIS, *supra* note 19, at §§ 6:19, 6:20, 6:25, 6:26.

[22] *See* Ethyl Corp. v. Environmental Protection Agency, 541 F.2d 1 (D.C. Cir. 1976) (in reviewing a rule phasing out lead additives in gasoline, the court took a hard look at the statement that lead in auto emissions endangers the public health or welfare).

[23] *See generally* Delong, *Informed Rulemaking and the Integration of Law and Policy*, 65 VA. L. REV. 257, 262-319 (1979).

[24] 5 U.S.C. §§ 556, 557 (1982) (APA procedures for a formal rulemaking).

[25] Stewart, *supra* note 10, at 1259, 1344-53; Harter, *Cure for Malaise, supra* note 7; Note, *supra* note 1. Congress has also examined negotiations as an alternative rulemaking process in response to concerns about the present regulatory system. *Regulatory Negotiation: Joint Hearings Before the Senate Select Comm. on Small Business and the Subcomm. on Oversight of Government*

Agencies other than EPA have experimented with a modified negotiated rulemaking process. The Occupational Safety and Health Administration (OSHA) tried a negotiated approach to drafting a standard for occupational exposure to benzene, and the Federal Aviation Administration (FAA) used a negotiated approach to develop a revised rule concerning flight and duty time for pilots.[27] However, neither of these agencies followed the model for negotiated rulemaking proposed by theorists, and thus these demonstrations are inadequate to test the concept. The OSHA effort involved only partial adherence to the suggested model—OSHA did not participate directly, but merely invited those affected by the rule to develop a version that they could agree upon. The OSHA effort did not succeed.[28] FAA was more successful—it adhered more closely to the

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*Management of the Senate Comm. on Governmental Affairs*, 96th Cong., 2d Sess. (1980) 271-77 [hereinafter cited as *Regulatory Negotiation Hearings*]. Following these hearings, proponents of negotiated rulemaking introduced The Regulatory Mediation Act of 1981, S. 1601, which sought to "establish an alternative rulemaking procedure which includes the establishment of regulatory negotiation committees."

[26] In practice, consensus is achieved when all the participants remain silent in response to the mediator's inquiry, "Is there anyone who cannot live with this latest restatement?" That moment is usually preceded by an elaborate effort to ensure that every participant's primary concerns have been satisfied. Such a consensus may be elusive, with the group perhaps only able to agree on a range of acceptable alternatives. This at least narrows the scope of possibilities, and the agency can use this product to draft a rule that falls within the acceptable boundaries. *See* Harter, *Regulatory Negotiation: The Experience So Far*, Resolve, Winter 1984, at 9 [hereinafter cited as Harter, *Experience So Far*].

[27] For a detailed discussion of these demonstrations, see H. Perritt, Analysis of Four Negotiated Rulemaking Experiments 50-118 (Sept. 4, 1985) (draft report to the Administrative Conference of the United States).

[28] There are competing views as to the reasons for OSHA's failures. One view is that OSHA's decisions not to conduct the negotiations under FACA or to participate directly in the negotiations, as EPA had done, minimized the chances of achieving a consensus. Another view of the OSHA negotiation is that the parties simply failed to invent a creative way of reconciling their substantive differences. It is hard to point to a specific reason why this might have been the case. Perhaps the benzene negotiation was framed too narrowly, or perhaps the parties did not consider a sufficient number of trades or options. It may have been that the pre-existing relationship among the parties was not conducive to a search for win-win outcomes. OSHA's difficulties have also been attributed to the departure of a key OSHA official during the negotiations, the infrequency of negotiating sessions,

model, but invited only a limited range of interests to participate.[29]

Only EPA has followed all the key prescriptions of the proponents of negotiated rulemaking—in one case to develop a proposed rule on noncompliance penalties for heavy engine manufacturers who fail to meet the requirements of the Clean Air Act, and in another case to redefine the bases for granting emergency exemptions from pesticide licensing regulations.[30] The results of EPA's two completed demonstrations provide the first evidence to test the theoretical suppositions underlying the concept of negotiated rulemaking.

## II. The Prevailing Theory

In order to evaluate EPA's negotiated rulemaking demonstrations systematically, a theoretical framework is required. There are two strands of theory that can presently be used to construct such a framework. The first addresses the hypothetical preconditions necessary for the success of a negotiated rulemaking, and the second sets forth criteria for evaluating rules produced through negotiation. The two strands are interrelated, and both draw on existing theories of negotiation and doctrines of administrative process.

### A. *The Hypothetical Preconditions for Success*

In his seminal study of negotiated rulemaking, Philip Harter proposed a set of hypotheses about the conditions under which regulatory negotiation would be likely to succeed. In developing these criteria for success, Harter drew upon analogous situations in the broad area of dispute resolution, in which negotiation is used to resolve complex policy problems.[31] The Administrative Conference of the United States endorsed his model and adopted a set of recommendations encouraging agencies to experiment with negotiated rulemaking.[32] Eight of the criteria proposed

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uncertainty about OMB's probable reaction to a rule viewed as favoring labor, and unrealistic expectations on the part of some of the participants.

[29] FAA's negotiated rulemaking effort began in the spring of 1983 and resulted in agreement on a proposed rule, issued by FAA in March, 1984. The negotiations moved slowly until FAA submitted a draft rule for the participants to review.

[30] For complete accounts of the two EPA demonstrations, see L. Susskind & G. McMahon, Documentation of EPA's Nonconformance Penalty Regulatory Negotiation Demonstration (1985) (Report prepared for the Office of Regulation and Standards of the United States Environmental Protection Agency); L. Susskind & D. Kronenberg, Documentation of EPA's Pesticide Exemption Regulatory Negotiation Demonstration (July 1985) (Report prepared for the Office of Regulation and Standards of the United States Environmental Protection Agency).

[31] Harter, *Cure for Malaise, supra* note 7, at 42-51.

[32] 1 C.F.R. § 305.82-4 (1985).

by Harter and noted by the Administrative Conference seem especially relevant and worth testing here.

First, people will come to the bargaining table only as long as they believe negotiations will produce an outcome for them that is as good as or better than the outcomes that would result from other available methods of pursuing their interests.[33] The concept that parties will pursue their own best interest in this way is a key assumption in negotiation theory, popularized by Fisher and Ury under the heading of BATNA (Best Alternative to a Negotiated Agreement).[34]

Second, the acceptability of negotiation as a dispute resolution process is determined by relative power,[35] another common strand in negotiation theory. Negotiations will only proceed if the parties are interdependent, that is, if they are constrained from acting unilaterally. Furthermore, if the imbalance of power is too great, the less powerful party is sure to seek an alternative context in which to press its claims, away from the negotiation table.[36]

Third, with regard to the issue of scale, fifteen parties is considered the "rough practical limit" on the number of participants that can work effectively in a negotiated rulemaking.[37]

Fourth, the issues must be readily apparent and the parties must be ready to address them.[38] Negotiation theorists, drawing in large part on the history of labor relations in the United States, have consistently identified "ripeness" as a criterion.[39] In the environmental mediation field, however, there is substantial disagreement about the relevance of the ripeness argument.[40]

Fifth, consensus building will be impeded if deeply held beliefs or values are in conflict.[41] If values are incontrovertible, there is no room for compromise or collaborative problem solving. This is linked to a sixth precondition that Raiffa and others have pointed out—namely, that there must be two or more issues "on the table" so that parties can maximize their overall interests by trading or bundling issues.[42] This precondition for success can best be understood as a restatement of the basic distinction between "distributive" and "integrative" bargaining.[43] In distributive bargaining situations, one side can only win if another side loses—the classic "zero-sum" situation. In integrative bargaining situations, all sides can come out ahead by trading across issues or items that they value differently—the classic "win-win" situation.

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[33] Harter, *Cure for Malaise, supra* note 7, at 43.

[34] R. Fisher & W. Ury, Getting to Yes 104 (1981).

[35] Harter, *Cure for Malaise, supra* note 7, at 43; Cormick, *Intervention and Self-Determination in Environmental Disputes: A Mediator's Perspective,* Resolve 23 (Winter 1982).

[36] Harter, *Cure for Malaise, supra* note 7, at 45; Fisher, *Negotiating Power,* 27 Behavioral Science 149-66 (1983).

[37] Harter, *Cure for Malaise, supra* note 7, at 46.

[38] Cormick, *supra* note 35, at 4, 6. *See also* Popper, *An Administrative Law Perspective on Consensual Decision Making,* 35 Ad. L. Rev. 255 (1983).

[39] Simpkin, Mediation and the Dynamics of Collective Bargaining 42 (1971).

[40] Susskind, *Environmental Mediation and the Accountability Problem,* 6 Vt. L. Rev. 17-18 (1981).

[41] This refers to deeply held, almost theological values, as opposed to how two parties might value the impact of an emission standard differently.

Seventh, the pressure of a deadline is necessary for successful negotiation.[44] Without a deadline, parties may purposefully delay or fail to focus on reaching a settlement.

Finally, some method of implementing the final agreements must be available and acceptable to the parties.[45] Parties must believe that their agreement will be implemented and that their participation will be worthwhile. The importance of perceptions and commitments in negotiation cannot be emphasized strongy enough.

While Harter framed his discussion in terms of presumed preconditions for success, some of these same criteria can be recast in terms of a framework for evaluating the agreements reached through a negotiation process.

### B. *A Framework for Evaluating Negotiated Rules*

Negotiated rulemaking will only be utilized more broadly if it achieves better results than the traditional rulemaking process.[46] The framework for evaluating negotiated rulemaking is premised on the baseline criteria that fairer and wiser rules will be produced at a lower cost. Following from Harter's discussion of preconditions for success, this framework should include the following specific criteria.

Each party must feel that the negotiated rule serves its interests at least as well as the version of the rule most likely to be developed through the conventional process.[47] The only way of testing this latter criterion is to compare the attitudes of the participants at the end of the process with their initial statements of expectations.

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[42] H. RAIFFA, THE ART AND SCIENCE OF NEGOTIATION, 164-165 (1982). However, as Harter points out, very few regulations involve single issues. Most proposals can be broken down into analyzing the scope of the remedy and the substantive and procedural elements of the regulation.

[43] LEWICKI & LITTERER, NEGOTIATION 75-129 (1985).

[44] Harter, *Cure for Malaise, supra* note 7, at 47. The legislature or courts could establish a perception of imminence by mandating agency action within a limited time period or the agency could set and publicize its own time frame for implementing regulatory programs.

[45] *Id.* at 51. Professor Dunlop identified several of the same preconditions as being necessary for successful labor negotiations. Dunlop, *supra* note 25, at 1430-43. Political scientists have identified consensual decisionmaking as a way to reconcile majority and minority goals. *See, e.g.*, T. LOWI, THE END OF LIBERALISM 31-41 (1969); R. DAHL, WHO GOVERNS? 315-24 (1961).

[46] Note, *supra* note 1, at 1874-76. *See also* Dunlop, *The Limits of Legal Compulsion, reprinted in* 1975 D.S.H. REP. (BNA) 884,886; Schuck, *Litigation, Bargaining, and Regulation*, REGULATION July-Aug. 1979, at 26.

A negotiation should yield realistic commitments from all of those involved. A rule that satisfies everyone in principal but cannot be implemented is of little use. Not only is the support of the participants important, but so too is the support of any interested party. The measure of success on this score is whether the proposed rule, drafted through the informal process, can weather the close scrutiny of those who did not participate in the negotiation process—and perhaps a "hard look" by the courts.

The interests of the parties should be so well-reconciled that no possible joint gains are left unrealized. Changes which would help a party without harming another party should not be missed.[48] If a more elegant method of reconciling the conflicting interests of the parties is possible, it will probably emerge once the draft agreement is publicized. Thus, it may take some time to evaluate fully negotiated rules relative to this criterion.

The agency should be able to demonstrate that it has upheld its statutory mandate, and the public-at-large should feel satisfied that both the process and the outcome were fair.[49] The perceptions of the parties who participated in the negotiations and the reactions of those they ostensibly represented ought to be a good preliminary indicator of success in this regard. Again, it may take some time to fully evaluate these perceptions.

Relationships among the participants in a negotiation should improve, not deteriorate, as a result of their interactions. The parties should be in a better position to deal with their differences in the future. Changed dynamics can be evaluated by questioning the participants and watching to see what happens in their subsequent dealings with each other.

The negotiated rule should take account of the best scientific and technical information available at the time of the negotiation. If, during the review and comment period, qualified experts testify that important scientific evidence has been ignored or misinterpreted, the result should clearly be judged an inferior or unwise rule. Although the wisdom of the negotiated rule will become clear once the rule has been implemented, it might be disastrous to delay evaluation until that point.

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[47] Parties must at least do as well as their BATNA—Best Alternative to a Negotiated Agreement. Fisher and Ury argue that the BATNA provides a standard or floor against which any proposal should be measured. R. Fisher & W. Ury, *supra* note 34, at 104.

[48] H. Raiffa, *supra* note 42, at 164-65.

[49] *Cf.* Note, *supra* note 1, at 1871, 1874-76 (alternative models of direct agency involvement in negotiated rulemaking and agency oversight without participation); Harter, *Cure for Malaise, supra* note 7, at 59-66 (advantages and disadvantages of agency participation). Some commentators have warned against agency participation. Since an agency has the final legal authority, parties might want to preserve their positions with the agency and therefore would negotiate less freely. Moreover, in its lead capacity, the agency might dominate the negotiations. However, these issues of inflexibility and posturing are endemic to all negotiations and not limited to instances where the agency is present.

Since negotiated rulemaking is a voluntary effort undertaken by a regulatory agency to improve its rulemaking procedures and not a response to legislative or judicial procedural directives, the benefits forecast by proponents of negotiated rulemaking will have to be demonstrated if agencies are to sustain an interest in the process and if affected parties are to continue to participate. In the next section, we will examine the two EPA negotiated rulemaking demonstrations in some detail.

## III. EPA's Regulatory Negotiation Demonstrations

The notion of using a negotiated approach to rulemaking at EPA first emerged during the Carter Administration, when procedural reforms akin to negotiated rulemaking were tested.[50] A top EPA official strongly supported the idea at major Senate hearings held in 1980.[51] While the change of Administration slowed the momentum,[52] appointment of Joseph Cannon as Acting Associate Administrator of EPA's Office of Planning and Resource Management in 1981 brought renewed interest. Cannon and several other EPA officials had strong personal commitments to various regulatory reforms and worked diligently within EPA to develop backing for the idea of negotiated rulemaking.[53] In the fall of 1982, Cannon announced that the Agency would move ahead aggressively to demonstrate the concept. In a January 1983 address to the Conservation Foundation's National Conference on Environmental Dispute Resolution

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[50] N. Baldwin, Negotiated Rulemaking: A Case Study of Administrative Reform 25-26 (1983) (unpublished Master's Thesis, Department of Urban Studies and Planning, MIT). During the Carter Administration, two successful experiments with procedural reforms illustrated that informal joint problem-solving could aid the progress of regulatory decision-making. The first of these reforms involved the creation of a technical panel which was responsible for making certain complex decisions regarding pesticides. The second was the adoption of an informal hearing procedure for the water pollution discharge permitting system, used to improve the efficiency of the existing, more cumbersome process. In both instances an informal participatory process was employed rather than the formal hearing method which tends to be more court-like and adversarial. *See also* Comment, *An Alternative to the Traditional Rulemaking Process: A Case Study of Negotiation in the Development of Regulations*, 29 VILL. L. REV. 1505, 1525-35 (1984) (describing the consultation procedure used by the Department of Labor's Office of Federal Contract Compliance Programs to gain public input prior to rulemaking).

[51] *Regulatory Negotiation Hearings*, *supra* note 25, at 83-84, 94-95 (1980) (statement of Roy N. Gamse, Deputy Assistant Administrator, Planning and Evaluation, EPA).

[52] N. Baldwin, *supra* note 50, at 25-26. Implementation of Regulatory Negotiation at EPA was slowed initially by the controversies associated with Administrator Ann Gorsuch.

[53] *Id.* at 25-28. Cannon had been a lawyer involved in litigation prior to his appointment and was deeply committed to the idea that many disputes were best resolved out of court. This personal commitment, coupled with the fact that many parties, including industry and the Reagan Administration's OMB and President's Task Force on Regulatory Relief, were supportive of the concept, prompted Cannon to make negotiated rulemaking his pet project.

Cannon announced that EPA was ready to develop several rules using negotiation.[54]

In February 1983, EPA published a notice in the *Federal Register* indicating that it intended to pursue the idea of negotiated rulemaking and used solicitation letters to invite interested parties to suggest candidate rules.[55] This followed more than a year of preliminary staff work at the Agency.[56] EPA engaged ERM-McGlennon to assist in contacting potentially interested parties[57] and obtained the services of the Program on Negotiation at Harvard Law School to document and analyze the upcoming demonstrations.

Dozens of candidate rules, many suggested by senior Agency staff, were considered carefully. In mid-1983, the agency came very close to selecting a rule governing disposal of low-level radioactive waste. By November, however, the Agency ended this effort because of resistance from the environmental community.[58] In exchange for dropping the low level radioactive waste rule, EPA asked leaders of key national environmental advocacy groups to suggest other rules for a first demonstration.

### A. *The Non-Conformance Penalty Rulemaking*

Section 206(g) of the Clean Air Act requires EPA to issue certificates of conformity to any class or category of heavy-duty vehicles or engines which exceeds an emission level, within an allowable upper limit, if the manufacturer pays a nonconformance penalty (NCP).[59] This penalty is intended not only to cost the manufacturer of a nonconforming vehicle or engine as much as compliance with the standard but also to create a financial disincentive for continued noncompliance.[60] Although the Clean

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[54] Harter, *The Experience So Far, supra* note 26, at 3.

[55] Regulatory Negotiation Project, 48 Fed. Reg. 7494 (1983).

[56] EPA made some crucial decisions regarding the proper negotiation procedures. The first of these was to employ a central staff from the Office of Planning and Program Evaluation to carry out the process. These individuals played a key role in educating others in the Agency about the regulatory negotiation process and worked to ensure that the top leadership at EPA understood the risks involved and would expend a great deal of time and effort to ensure success.

[57] John McGlennon, former EPA Administrator for Region One, directs ERM-McGlennon, a Boston-based firm specializing in natural resource issues and dispute resolution.

[58] L. Susskind & D.Fish, Status Report II: The Pre-Negotiation Phase of Negotiated Rulemaking: The Case of the Low-Level Radioactive Waste Rule 7 (June 1984) (unpublished manuscript). The environmentalists felt that the low level radiation waste rule involved perceptions and values that differed so greatly among the key stakeholders that successful negotiations were unlikely.

[59] Clean Air Act, 42 U.S.C. § 725(g) (1982).

[60] *Id.* The 1977 Amendments identified specific considerations to be used in estimating noncompliance costs, including: the degree to which emission standards were exceeded; the imposition periodically of increased penalties in order to incorporate incentives for the development of engines which are more able to meet the prescribed level of emission reduction; and the removal of any competitive disadvantage to manufacturers who choose to produce engines in compliance with the standard. Clean Air Act § 206(g)(3), 42 U.S.C. § 7521 (1982).

Air Act Amendments were passed in 1977, EPA had not issued NCP regulations by late 1983.[61]

In December 1983, David Doniger of the Natural Resources Defense Council (NRDC) formally proposed nonconformance penalties to EPA as a candidate rule for negotiated rulemaking.[62] Between December 1983 and March 1984, ERM-McGlennon found widespread support for negotiating the NCP rule among potential stakeholders. Charles Freed, Director of EPA's Manufacturers Operations Division, the program office responsible for the rule, enthusiastically supported using a negotiated approach, as did the EPA Office of General Counsel and Office of Program Planning and Evaluation. Environmentalists were generally supportive, viewing NCPs as a means to accommodate temporary industry needs while holding industry to technology-forcing standards. Smaller manufacturers were somewhat wary of the costs of participating in a negotiated rulemaking and felt that any NCP rule had to preserve their competitiveness. Larger manufacturers generally supported the proposed process and felt that they had adequate staff to participate in the process.[63] In general, all stakeholders felt that the rule was important enough to merit their involvement and that it did not involve the type of "life and death" value questions that would have made negotiation—an unfamiliar process at any rate—appear less workable.

In an April 1984 *Federal Register* notice, EPA announced its intention to develop an NCP rule using a regulatory negotiation.[64] At an organizational meeting, also held in April, some twenty participants met to learn more about the proposed process and to discuss how the negotiations would proceed.[65] At that time, EPA announced the creation of a $50,000 resource pool—a fund that any or all of the participants would be able to draw upon to cover the costs of technical studies or other costs related to their participation.[66]

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[61] EPA proposed NCP regulations in 1979 but never finalized them. Two years later, in April 1981, the Administration announced numerous regulatory relief measures which would reduce the economic impact of governmental regulations on industry. This put the NCP regulations on the backburner for several more years. L. Susskind & G. McMahon, *supra* note 30, at 7-8.

[62] Letter from David Doniger to William Ruckelshaus (Dec. 7, 1983), *reprinted in* L. Susskind & G. McMahon, *supra* note 30, at app. B. At the same time Doniger formally notified EPA Administrator Ruckelshaus of NRDC's intent to sue EPA for failure to publish several rules, including the NCP rule. Doniger was strengthening his BATNA. *See supra* note 34.

[63] L. Susskind & G. McMahon, *supra* note 30, at 34-39.

[64] Notice of Intent to Form Advisory Committee, 49 Fed. Reg. 17,577 (1984).

[65] The original conflict assessment conducted by ERM-McGlennon produced a list of participants that included eleven engine manufacturers, five industry associations, two environmental organizations (NRDC and the National Clean Air Coalition), and three environmental agencies or associations. Subsequently, two other groups asked to participate. Both were accepted, while the Clean Air Coalition decided to let NRDC represent the environmental concerns. The final list of manufacturing participants included the Automobile Importers of America, the American Trucking Association, the Engine Manufacturers Association, the Manufacturers Emission Control Association, General Motors, Chrysler, International Harvester, ONAN Corporation, Caterpillar Tractor Company, Volvo Truck Company, Isuzu Motors America, Ford, Mack Truck Corporation, IVECO Trucks of America, Cummins Engine, Freightline/Mercedes-Benz, and Motor Vehicle Manufacturers Association. The non-manufacturers included the California Air Resource Board, the State and Territorial

Negotiations began June 14, 1984, and ended October 12, 1984. In order to develop some structure for the process, the negotiation facilitator opened the June session by asking participants to produce a statement of issues reflecting their interests. A final list of ten issues was synthesized to help organize the work of the negotiating committee. Three work groups were formed around the following issues: Application of NCPs, Penalty Structure and Rate Setting, and NCP Administration and Enforcement.[67]

Five one-day negotiating sessions dealing with substantive aspects of the NCP rule and numerous work group sessions dealing with specific technical and administrative issues were held during a four month period. The NCP negotiating committee used over $10,000 to fund an independent study of a proposed engine testing plan. Other collaborative technical work was done by committee members who designed a micro-computer-based spreadsheet model to test the impacts of parameter changes in the penalty formula.[68]

The negotiations were conducted under a Federal Advisory Committee Act (FACA) charter.[69] Notice of the NCP negotiating committee sessions was given in the *Federal Register*, and meetings were open to the public. The committee eventually reached consensus[70] on all of the issues it originally identified at the first meeting.

In reaching this consensus, EPA's choice of a facilitator was crucial. The ERM-McGlennon team, which had extensive mediation experience,

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Air Pollution Program Administration, the Colorado Department of Health, the Natural Resources Defense Council, and EPA/OMB.

[66] Because of the many unanswered questions surrounding the issue of intervenor funding, EPA thought it wise to raise private foundation funds to supplement the Agency's contribution to the resource pool, a task requiring substantial effort. An independent body, the American Arbitration Association, was given sole responsibility for the management of these funds.

[67] Each working group was responsible for its own subset of issues. L. Susskind & G. McMahon, *supra* note 30, at 73.

[68] *Id.* at 156-157.

[69] The use of a FACA charter (Federal Advisory Committee Act, 5 U.S.C.app. § 1-14 (1982 & Supp. II 1985)) situates the negotiating committee within the labyrinths of existing federal administrative procedures. Among the FACA requirements are: 1) the negotiating committee is constituted as an advisory group to EPA, chartered by the General Services Administration of the Office of Management and Budget; 2) meetings must be open to the public and controlled by the agency; 3) formation of the group and meeting schedules must be announced in the *Federal Register*; and, 4) detailed minutes must be kept of all meetings. Additionally, FACA requires close scrutiny of advisory committees by Congress and the executive branch. There is some uncertainty about whether FACA applies to negotiated rulemaking-type groups. The Administrative Conference of the United States has concluded that such uncertainty about the applicability of FACA has tended to discourage useful contacts between the agency and nongovernmental sectors.

[70] Consensus is defined *supra* note 26. See also H. RAIFFA, *supra* note 42, at 218-25, for a description of the use of joint fact finding in the mediation of conflicts.

took the lead in generating agreement on a detailed agenda and work schedule, organizing work group meetings at which components of the final version of the regulation were drafted, and convening the full group to review these work group drafts. It also assumed responsibility for the preparation of detailed minutes of all committee meetings and of the complete draft of the final rule. Finally, the facilitation team initiated caucuses during and outside of meetings, maintained frequent contact with all participants, and intervened quite actively during several of the sessions.[71]

After the last negotiation session on October 12, 1984, in which all the issues were resolved, a four-member subcommittee—consisting of EPA, state, environmental, and industry representatives—was given the responsibility of translating the tentative agreement into a consensus document. A first draft was circulated in mid-October, and comments were solicited. The subcommittee then used several conference calls to prepare the final draft that was signed by the entire committee in December 1984.

With the consensus statement signed by all participants, EPA published its notice of proposed rulemaking on March 6, 1985.[72] Only thirteen comments were received during the comment period, all in support of the committee's proposal. The final rule was promulgated without opposition on August 30, 1985.[73]

### B. *The Pesticide Exemption Rule*

Regulations promulgated pursuant to the 1972 Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) specify that registration applications for new pesticides must include information demonstrating the potential risks they pose to human health.[74] Unfortunately, at present, there is no completely reliable empirical test of a substance's relative toxicity or safety. Data used to demonstrate such properties are drawn chiefly from lifetime-exposure animal bioassays. Completion of such tests for a new compound may take two years. This means that it might take four years to move a new pesticide from development to commercial use. Neither the agricultural users nor the producers of such products find this time frame acceptable.[75] Section 18 of FIFRA gives the Administrator of EPA discretionary authority to exempt a state or federal agency from any provisions of the Act if it is determined that an emergency condition exists which requires an exemption.[76] Given the uncertainty of much of the required scientific information, such discretion has the potential for misuse.

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[71] L. Susskind & G. McMahon, *supra* note 30, at 126, 171-175.

[72] Notice of Proposed Rulemaking, 50 Fed. Reg. 9204 (1985).

[73] Final Rule, 50 Fed. Reg. 35,374 (1985).

[74] Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136a (1982).

[75] L. Susskind & D. Kronenberg, *supra* note 30, at 2.

In March of 1983, EPA's Office of Pesticide Programs published an internal audit of Section 18.[77] The audit concluded that there had been a dramatic increase in the number of exemptions requested. The House Subcommittee on Department Operations, Research, and Foreign Agriculture expressed concern that states or industries might be using Section 18 to circumvent more stringent data and risk control requirements which apply to registration.[78]

Prompted by this audit and resulting Congressional concern, EPA began to review the Section 18 regulations in January 1984. The Agency held three public hearings to solicit recommendations. In August 1984, EPA published a *Federal Register* notice declaring its intent to form an advisory committee to develop new Section 18 regulations.[79]

The Section 18 rule was proposed as a candidate for negotiated rulemaking by the National Audubon Society.[80] In agreeing to a negotiated format, the Office of Pesticide Programs stipulated that the negotiations span no more than four months and indicated that if no consensus were reached by that time, the Agency would dissolve the committee and promulgate regulations drafted internally.[81] An advanced notice of proposed rulemaking was published in the *Federal Register* on April 8, 1985.[82]

As in the NCP demonstration, a central staff from the Office of Planning and Policy Evaluation was employed to carry out the negotiated rulemaking and ERM-McGlennon was selected as convenor, with responsibilities for completing pre-negotiation activities. In contrast with the NCP experience, however, the EPA Policy Office made a decision to appoint a facilitator other than the convenor. The new facilitator would be responsible for the remaining responsibilities, which are concentrated heavily in the negotiation and post-negotiation stages, including conducting and mediating meetings and insuring that consensus is achieved. Moreover, EPA decided to experiment with the use of an "inside" facilitator—someone who worked for EPA but was not associated with the EPA office directly involved in negotiating the rule. EPA was determined to explore the advantages and disadvantages of using an "honest broker" from within the Agency to facilitate a negotiated rulemaking despite doubts raised by groups such as the Conservation Foundation about how the neutrality of such a facilitator would be viewed.[83] LaJuana Wilcher, a special assistant to the Office of General Counsel, was selected as the mediator.

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[76] Exemption of Federal and State Agencies for the Use of Pesticides Under Emergency Conditions, 40 C.F.R. § 166 (1985).

[77] Registration Division, Office of Pesticide Programs, EPA, Audit of Emergency Exemption and Special Local Needs Programs as Authorized Under Section 18 and 24(c) of FIFRA (1983).

[78] *The Pesticide Regulatory Program Study: Hearing Before the Subcomm. on Department Operations, Research, and Foreign Agriculture of the House Comm. on Agriculture,* 97th Cong., 2d Sess. 12 (1983)

[79] L. Susskind & D. Kronenberg, *supra* note 30, at 7.

[80] *Id.* at 4-5. Interviews conducted with all participants before the demonstrations revealed that environmentalists wanted to develop an exemption procedure limited to true emergencies. In general, there was a feeling that exemptions were being granted too frequently.

[81] *Id.* Preliminary interviews with all participants did not indicate that this time frame was a major problem, unlike the NCP negotiated rulemaking, where the timetable was thought to be a problem by most participants at the start of the negotiations.

[82] Exemption of Federal and State Agencies r Use of Pesticides Under Emergency Conditions, 50 Fed. Reg. 13,944 (1985) (to be codified at 40 C.F.R. pt.166).

ERM-McGlennon again conducted preliminary interviews with potentially interested parties and eventually produced a list of sixteen likely participants, in addition to EPA.[84] The sixteen included four environmental groups, four state organizations, four agricultural user groups, two manufacturers, and the USDA.[85] The basis for selection lay primarily in the participants' familiarity and past involvement with FIFRA and Section 18, their ability to represent important interests, and their willingness to participate.[86] Six additional parties were added after they submitted requests to participate at the preliminary organizational meeting.[87] The final group of twenty-two members was proposed by EPA to be a formal advisory committee under FACA.

An introductory meeting of the committee was held on August 16, 1984. With the help of ERM-McGlennon and the EPA facilitator, the group agreed upon an agenda, organized subcommittees to work on the various issues, adopted protocols (including guidelines for the use of a

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[83] L. Susskind & D. Kronenberg, *supra* note 30, at 6-7. It may be difficult for participants to believe that the interests of an EPA Program Office do not somehow influence the behavior of a "neutral" facilitator from another EPA office.

[84] *Id.* at 6, 8. Potential stakeholders were identified for ERM-McGlennon by EPA's Office of Pesticide Programs (OPP), by the participants themselves during interviews, and from transcripts of testimony at the January 1984 hearings. Several rounds of interviews narrowed the number of participants to 16, although no upper limit on participants had been set by EPA. *Id.* at app. 6-7.

[85] *Id.* app. 7 at 2. Environmental organizations included National Audubon Society, National Coalition Against the Misuse of Pesticides, National Wildlife Federation, and Defenders of Wildlife. State organizations included National Association of State Departments of Agriculture, Association of State and Territorial Health Officials, State FIFRA Issues Research Group, and Assocation of American Pesticide Control Officials. Pesticide user groups were the Pesticide Users Advisory Committee, American Farm Bureau Federation, California Citrus Council, Florida Citrus Mutual, and National Food Processors Association. Manufacturers were represented by the National Agricultural Chemical Association. Federal Agencies included USDA and EPA's Office of Pesticide Programs.

[86] *Id.* app. 7 at 1-2.

[87] The six groups were American Seed Trade Association, Interregional Research Project No. 4, National Association of Wheat Growers, National Cattlemen's Association, National Corn Growers Association, and the National Cotton Councils. *See id.* list of participants at iv-v.

$50,000 resource pool), and specified the technical information they needed to start.[88] EPA's Office of Pesticide Programs, the Agency representative in the negotiations, provided a draft of the preamble and regulation at the outset, in contrast to the relatively clean slate with which the NCP committee began. This draft provided the committee with considerable guidance in structuring its discussions.[89]

Negotiations began September 28, 1984, and ended January 16, 1985. There were six formal sessions, three of which lasted two days each. Smaller work groups were organized around the three key issue areas—Definition of Emergency, Health and Safety, and Implementation—and met as needed. The earlier meetings were devoted primarily to fact-finding, while the latter ones became more issue oriented, with alliances often developing. Late in the negotiations, participants seemed to become more willing to take strong stands or negotiate assertively.[90] Much of the substance of the agreement was finalized during the last two-day meeting.[91]

As it turned out, the resource pool was not needed to finance technical assistance, as it was in the NCP demonstration. Due to the nature of the criteria for exemption, negotiations did not revolve around conflicts over the legitimacy of scientific evidence but were concerned with more general decisions often involving definitions. When differences in the interpretation of technical matters did arise, however, participants in the second demonstration were able to resolve them satisfactorily without outside research.[92]

Although the EPA facilitator was not as active as the ERM-McGlennon staff had been in the NCP negotiation, participants in the Section 18 negotiations were able to reach agreement at the sixth and final meeting. The consensus agreement was signed on January 16, 1985, and published as a proposed rulemaking on April 8, 1985.[93] Nineteen comments were received during the public comment period; three of these were from participants and supported the proposal.[94] The others raised relatively minor points.[95] EPA sent copies of the comments to the participants, but the groups decided to support EPA's final draft without reconvening. The final rule is expected to be published in the *Federal Register* in January 1986.[96]

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[88] *Id.* at 7-11.

[89] *See id.* at 58. In other circumstances, a similar maneuver could easily have been used to coerce them into following EPA's lead.

[90] *Id.* at 71.

[91] *Id.* at ii.

[92] *Id.* at 137.

[93] Proposed Rule, 50 Fed. Reg. 13,944 (1985).

[94] In an interesting provision, participants agreed that the consensus statement was not binding and did not preclude entities or persons who may be members of the signing organization (i.e. the umbrella organization) from submitting comments individually, but did prohibit the signing organizations themselves from commenting. Three organizations apparently took this circuitous route to show their added support. L. Susskind & D. Kronenberg, *supra* note 30, at 107-09.

### C. *Outlines of the Process in Practice*

Based on EPA's experiences, we suggest that negotiated rulemaking can best be understood as a three-stage process. During the first stage—prenegotiation—the agency decides whether to negotiate a specific rule and gives appropriate notice of its intentions in the *Federal Register*. A convenor is then designated by the agency to identify the likely stakeholders and to convince them to send senior representatives to the negotiating table. The convenor must work with all the relevant parties to organize an introductory session, cope with subsequent requests for permission to participate, develop deadlines and draft a set of ground rules to guide the proceedings, and assist the participants in obtaining the technical and financial resources they need to proceed, including training in negotiation if the parties desire it. Essentially, the convenor seeks to uncover and remove obstacles to negotiating the rule. If he or she fails to convince most of the key parties to come to the table or if the necessary resources cannot be obtained, the convenor can call the process to a halt. While the convenor is laying the groundwork for the process, the agency central staff should coordinate the internal decision to use negotiated rulemaking, gather the necessary financial resources, tend to the mandatory notice requirements, and prepare a request for a FACA charter.

During the second stage—negotiation—the parties need to structure a work program, agenda, and timetable; undertake a process of joint fact finding, using consultants if necessary; organize subcommittees or working groups to develop preliminary drafts of proposals; confront major differences in their interests; produce careful summaries of the agreements reached at their meetings; and prepare a written draft of the proposed rule for all the participants, including the agency, to circulate for review. The success of these efforts depends in large measure on the assistance provided by a non-partisan facilitator acceptable to all the parties. The facilitator might be the original convenor.

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[95] The comments focused on very specific language and clarification of particular aspects of the rule and did not involve the more general criticisms which are common in the traditional rulemaking notice and comment period. Telephone interview with Chris Kirtz, EPA Regulatory Negotiation Project Director (Nov. 15, 1985).

[96] *Id.*

During the final stage—post-negotiation—the facilitator should assist the parties in winning support for the draft agreement from their constituents or members and arrange for a formal signing that will commit the participants to support the final draft during the review and comment period. Following review and comment, the agency may decide to reconvene the participants, but not necessarily as a formal committee, to review the comments received and to discuss the agency's decisions regarding the language of the final rule.

## IV. Comparing Theory to Practice

Based on the evaluative framework described earlier and first-hand observations of EPA's experience, both of EPA's demonstrations must be judged successful.[97] Detailed interviews with the participants indicated that almost every one of them felt that his or her group's interests were well served by the negotiated agreements. While they were surprised at the amount of time and effort it took to negotiate a consensus rule, they agreed that the time invested up-front reduced the overall amount of time involved in litigation and subsequent administrative wrangling.

Many of the participants felt that the negotiated outcome was far better than what they might have expected had they gone to court.[98] Versions of the two agreements that would have helped some parties more without hurting the others did not emerge during or after the review and comment process, and both rules were formally adopted without court challenge. Thus, the first step toward implementation was completed successfully.

The relevant technical staffs at EPA felt that the Agency's statutory mandate had been upheld in both instances and that the wisest possible rules had emerged. Furthermore, the relationships among the parties, many of whom came into the negotiations with a long history of harsh adversarial relations, improved markedly. The participants were left in a better position to deal with each other in the future.[99] The parties not only agreed to sign the negotiated rule, they agreed to support it during the review and comment process. All in all, in the eyes of the participants and others closely observing the process, negotiated rulemaking appeared to produce more legitimate outcomes at a lower cost than usual.[100]

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[97] *See supra* note 30. In the first demonstration, the manufacturers were almost unanimous in their conclusion that the negotiation produced a better rule than the conventional process would have produced. Non-manufacturers also felt that the rule was probably better. Improvement was attributed to the opportunity stakeholders with varying interests had to probe each other's positions directly rather than working through EPA. L. Susskind & G. McMahon, *supra* note 30, at 133-34. In the second demonstration, negotiators for the growers and other agricultural interests were nearly unanimous in their view that negotiation produced a rule more representative of their interests with less conflict. Environmental representatives also offered a positive assessment of regulatory negotiations relative to the standard notice and comment procedure. One said that the environmental community "wouldn't have permitted EPA to take Section 18 through standard rulemaking." Agency representatives as a group were not inclined to forecast a vastly different outcome had negotiations not been used. L. Susskind & D. Kronenberg, *supra* note 30, at 117-18.

[98] L. Susskind & G. McMahon, *supra* note 30, at 133.

[99] L. Susskind & G. McMahon, *supra* note 30, at 180; L. Susskind & D. Kronenberg, *supra*

The results of EPA's two demonstrations offer the first full-fledged opportunity to reexamine the hypothetical claims of both the proponents and the critics of negotiated rulemaking and to suggest refinements in the provisional theory.

### A. *Rule Selection*

EPA's experience proves the importance of the theorists' prescriptions for rule selection. First, parties are unlikely to make the necessary concessions to reach consensus if the only way to reach agreement is to compromise fundamental values or beliefs.[101] Second, success in a negotiation depends on having a large enough range of issues or options to allow trade-offs or creative packaging.[102]

EPA's first candidate rule was rejected by key environmental groups because they felt that it was impossible to negotiate and engage in compromise over a *de minimis* rule regarding low-level radioactive waste disposal. As far as they were concerned, the *de minimis* level had to be zero. Since compromise was impossible, negotiations would be fruitless.

In contrast to this first attempt, EPA's two demonstration rules involved a range of sub-issues to which various groups attached different degrees of importance. This enabled them to make trades that led to "win-win" packages that everyone could support. Perhaps even more importantly, both demonstrations centered on the distribution of economic gains and losses and not on EPA's right to regulate. As long as the Agency achieved its basic objectives, it was willing to work with the other participants to allocate gains and losses fairly. Neither of EPA's first two demonstrations involved fundamental value conflicts. The question remains, though, as to what proportion of the rules issued each year revolves around distributive bargaining ("win-lose") issues and what proportion lends itself to integrative ("win-win") bargaining.

### B. *Incentives to Negotiate*

The theorists suggest that interested parties will choose not to participate in a negotiation if they feel that their alternatives away from the

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note 30, at 111-13, 131-32, 146.

[100] L. Susskind & G. McMahon, *supra* note 30, at 133-34.

[101] Harter, *Cure for Malaise*, *supra* note 7, at 49.

[102] S. Breyer, Regulation and its Reform 122 (1982).

bargaining table will produce better results.[103] The EPA experience suggests that parties to a proposed rulemaking may not be sure of their BATNAs (Best Alternative to a Negotiated Agreement), and this uncertainty may help bring them to the bargaining table.

In both demonstrations, each group's BATNA was diminished by the willingness of all the other parties to participate in the demonstrations. Unless all the key groups refused to participate, any group that decided to hold out and challenge the rule in court at a later time would face difficulty mustering allies for such a challenge. Moreover, while the courts have not indicated whether they will set aside the "hard look" doctrine in instances where a well-managed negotiated rulemaking effort has been completed, the possibility of such a court response increases the uncertainty of a hold-out strategy and makes cooperation by all interested parties almost inevitable.[104]

Many of the groups involved in the conventional rulemaking process spend a great deal of their resources trying to influence agency decision-making. Many of the same groups complain that the review and comment process does not come until after the agency has already committed itself to a course of action. For these groups, the offer to negotiate a draft of the proposed rule was too attractive to pass up. If the interest groups failed to get what they wanted from EPA, they knew they could walk away and block consensus. For most of the participants, the prospect of negotiation thus looked as good as, if not better than, their alternatives, and participation did not preclude them from pursuing other options later.

In sum, many of the groups were unsure of what policy options the other groups might pursue, and this uncertainty affected their decisions. Working behind the scenes, the convenor may have encouraged participation and altered the parties' estimates of their BATNAs by manipulating this uncertainty and changing their perceived costs and benefits. The convenor urged participants to consider the advantages of interacting with the Agency before it had committed itself to a draft of the proposed rule and reassured them that the process was voluntary and that they could quit at any time.

### C. *Unequal Power*

Harter has suggested that negotiated rulemaking will fail if any party can achieve its goals without having to deal with others.[105] He has also implied that the more powerful negotiators will achieve their aims, while the less powerful interests are likely to be disappointed. The EPA demonstrations did not support these hypotheses. In both instances environmental interest groups were outnumbered and came into the negotiations with what the other parties perceived as uncertain power.[106] They were, however, quite capable of holding their own in the negotiations. In fact, in the eyes of some of the participants, the environmental group representatives exerted substantial influence over the final agreements.[107]

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[103] R. Fisher & W. Ury, *supra* note 34, at 104.

[104] *See infra* text accompanying note 133.

[105] Harter, *Cure for Malaise*, *supra* note 7, at 45.

Individual negotiating skills also altered traditional power relations, and the number of representatives was secondary to the negotiating abilities of each participant. Generally, participants in both demonstrations entered the negotiations without a great deal of negotiation experience, even though some were quite familiar with adversarial proceedings. The initial negotiation training provided by the facilitator may have helped equalize ability levels.

Certainly the availability of the resource pool gave many of the groups a sense of equal access to information and technical advice. The resource pool helped to even up some of the sharp disparities in the availability of financial resources and provided assurance to even the least well-to-do groups that their representatives would be able to cover the costs of participating in all meetings.

Further, even when unequal political power exists, the process of facilitated negotiation appears to impose some constraints on the exercise of that power. For example, EPA certainly reserved the right to walk away from the table at any time and write whatever rule it wanted, but the Agency did not want to appear responsible for the failure of the negotiation effort. The presence of a non-partisan facilitator who could report objectively on which groups had reason to feel co-opted or treated unfairly may have provided a check on the actions of the more powerful parties.

Furthermore, power in negotiations is quite fluid. Certain power relationships were altered during the negotiations as "less powerful" groups coalesced behind certain strong arguments and formed coalitions. Harter and others seem to have overlooked the impact of coalition formation on the outcome of a negotiated rulemaking. They also appear to have underestimated the impact of momentum as the drive toward consensus held some of the more recalcitrant groups in check. As Fisher has pointed out, a party's power in negotiations depends on a number of factors, including skill and knowledge, alternatives to a negotiated agreement, the ability to form coalitions, and financial and human resources.[108] Unequal power

[106] L. Susskind & D. Kronenberg, *supra* note 30, at 34.
[107] L. Susskind & G. McMahon, *supra* note 30, at 144.
[108] Fisher, *supra* note 36, at 153.

entering a negotiated rulemaking turned out to be much less of a problem than Harter and others imagined because the process empowers all the parties in various ways and constrains the most powerful.

### D. *Scale*

Harter was quite clear regarding his presumption about the maximum scale at which a negotiated rulemaking could proceed successfully.[109] He claimed that approximately fifteen participants would be the maximum, but his supposition is not borne out by the EPA experience.

Through indirect delegation of representation, skillful facilitation, and the use of subcommittees, EPA was able to include more than twenty-five participants in its demonstrations.[110] Most public decision-making processes are not facilitated, so very few people are familiar with anything other than the back-and-forth pattern of public discourse which gets harder to manage as the number of people involved grows. Facilitation by a skilled professional, on the other hand, can insure effective communication among much larger numbers of people.

EPA was also able to accommodate larger numbers of participants by breaking larger groups into smaller working groups to complete tasks that might otherwise have been too difficult to handle in a group of twenty-five. These tasks included generating draft documents for the full committee to consider. As negotiating groups get larger, additional working groups may be used to ensure full participation by all interested parties.

Harter implied that the fifteen participants would represent fifteen groups. In fact, through a process of pyramiding representation managed by a skillful convenor during the pre-negotiation phase, a great many more groups can become involved indirectly in negotiated rulemaking. During the conflict assessments undertaken by ERM-McGlennon, it became clear that some groups were prepared to sit out the negotiations as long as they could be assured that other particular groups with common interests would be participating.[111] Many of the individual participants had alternates who could sit in for them when other commitments prevented them from attending meetings, and participants were often accompanied by staff when they attended negotiation sessions. If observers are also counted, at times there were more than thirty-five individuals present at scheduled sessions. A rough practical limit on the number of participants should certainly exceed twenty-five.

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[109] Harter, *Cure for Malaise*, *supra* note 7, at 46.

[110] In the second demonstration the ERM mediators felt that 25 was close to the practical limit on the number of parties that could be managed effectively by a mediation team of two or three people. L. Susskind & D. Kronenberg, *supra* note 30, at 135.

[111] L. Susskind & G. McMahon, *supra* note 30, at 20-21.

### E. *Ripeness*

Like many other negotiation theorists, Harter suggests that issues must be readily apparent and that parties must be ready to address them if a negotiation is to succeed.[112] The EPA experience, however, challenges the importance of this criterion.

EPA hired a convenor to undertake a conflict assessment aimed at identifying potential stakeholding parties. Many of those contacted were not aware that a negotiation on an issue of concern to them was about to take place.[113] Many of those who actually participated were only vaguely aware of some of the technical aspects of the rules under discussion. Additionally, at the outset of the negotiations, there was reluctance on the part of some of the administrators within EPA to participate in the demonstrations.

When the parties arrived at the initial organizational sessions for each of the negotiated rulemakings, they were confronted with the task of setting a detailed agenda of items to be discussed. While everyone knew that the product of the negotiation process was supposed to be a draft rule, they were vague in preliminary interviews with regard to the appropriate range of issues to discuss.[114]

Even the agencies directly involved in negotiations had conflicting ideas about their authority and appropriate roles. EPA and OMB differed at the outset regarding the appropriate scope of the two FACA charters[115] and the role that OMB would play in the negotiations. OMB felt it should not participate directly since it wanted to reserve the option of disapproving the negotiated rule if, in its judgment, the rule was cost-ineffective pursuant to Executive Order 12,291.[116]

From a theoretical standpoint, EPA's two demonstrations thus did not meet the criterion of ripeness. Yet, even with the confusion about who would participate and what the agenda would be, the demonstrations were successful. This merely confirms the inappropriateness of the ripeness criterion. Most public dispute resolution efforts are likely to involve a changeable and expandable agenda and a shifting set of interest groups who are not quite clear why they are at the table.

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[112] Harter, *Cure for Malaise*, *supra* note 7, at 47; *see also* Popper, *supra* note 38, at 286; Cormick, *supra* note 35, at 46.

[113] L. Susskind & G. McMahon, *supra* note 30; L. Susskind & D. Kronenberg, *supra* note 30.

[114] L. Susskind & G. McMahon, *supra* note 30, at 72.

[115] Telephone Interview with Chris Kirtz, EPA Regulatory Negotiation Project Director (September 1985); Telephone Interview with Nell Minnow, OMB (September 1985).

[116] Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981), 3 C.F.R. pt. 127 (1981). Executive Order 12,291 gives OMB responsibility for evaluating the cost-effectiveness of proposed rules.

### F. *Deadlines*

Harter and others have argued for the importance of deadlines as a tool for keeping the negotiations moving and for avoiding dilatory tactics.[117] In most labor-management negotiations, the greatest progress traditionally occurs close to the final deadline. In accordance with this view, EPA initially set tight deadlines. In the first demonstration, the Agency actually shortened the deadline early in the process, thereby angering participants.[118] Somewhat to their surprise, however, participants were able to reach agreement even with the shortened schedule. Adverse effects became apparent when participants felt they needed more time to check back with their constitutents for reactions to the proposed agreement.

While the deadlines played a helpful role at the outset, the willingness of all parties to negotiate in "good faith" and with a great deal of energy proved to be as significant as the tight negotiating schedule.

### G. *The Concerns of the Critics*

The EPA demonstrations address many of the concerns mentioned regarding negotiated rulemaking. Some of the critics have charged that interests that ought to be represented would be absent for one reason or another. Stewart has expressed concern that ad hoc processes of selecting participants might not produce sufficient or credible representation.[119] Other observers have expressed doubts about the ability of ad hoc representatives to speak for their constituents or to bind their members.[120] EPA's success, however, suggests that the openness of the *Federal Register* notice procedures plus the thoroughness of the convenor's nation-wide solicitation can produce credible representation. If key groups had been missed, their views would undoubtedly have emerged during the review and comment process. They did not. Also, EPA had considerable success identifying effective organizational spokespeople to participate in the demonstrations. Since there was much at stake for the organizations involved, they did not have to be persuaded to send top-level people.

A number of critics have also expressed concern about the "delegation problem"—the abrogation of agency responsibility implied by the willingness of an agency to agree ahead of time to be bound by a negotiated consensus.[121] Because negotiated rulemaking can be viewed as the sharing of promulgation powers with private citizens who are not accountable to the electorate, delegation issues warrant careful attention. However, it is important not to exaggerate the magnitude of the problem. A review of the two EPA demonstrations shows that the Agency did not in any way abdicate its administrative responsibilities.

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[117] Harter, *Cure for Malaise*, *supra* note 7, at 47.

[118] L. Susskind & G. McMahon, *supra* note 30, at 74-82.

[119] Interview with Richard Stewart, Professor of Law, Harvard Law School (September 1985).

[120] Rodwin, 3 ENVTL. IMPACT ASSESSMENT REV. 376 (1982).

EPA promised the participants that the Agency would "live with" a consensus rule, publishing it as a notice of proposed rulemaking. The Agency was not agreeing to defer to the group and support an unknown quantity, however, since the Agency itself, as a direct participant in the negotiations, had the equivalent of a veto over any consensus. Nor were the top-level agency officials delegating authority to low-level officials sitting at the negotiating table. Every participant knew that the EPA representatives had to do as much checking back with superiors as did the others at the table. Moreover, EPA sought FACA charters for both its committees, and it attempted to comply with the letter of the law since it ran all of the full negotiating sessions on an open basis. Thus, the participants were members of official Agency advisory committees, and EPA was not delegating its authority to a group of private citizens.

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[121] H. Perritt, *supra* note 27, at 160-63. Perritt concluded in his report to ACUS that if an agency delegates its authority to a group of private citizens, further delegation problems are presented. One such problem is whether such delegation is within the agency's authority delegated from the Congress. Another problem is that the private delegates are even less accountable politically than the agency officials.

Compliance with the delegation doctrine has concerned proponents of negotiated rulemaking. While it is appropriate to think about delegation issues associated with negotiated rulemaking, it is important not to exaggerate the magnitude of the problem. The early proponents of regulatory negotiation offered a number of reasons why violation of the delegation doctrine does not result from negotiated rulemaking.

First, under all the current conceptions of negotiated rulemaking, and clearly reflected in the ACUS guidelines, negotiators play only an advisory role in the agency; the agency retains the final decisionmaking authority. Such an advisory role has been approved by the courts in a variety of circumstances. Second, the nature of negotiated rulemaking, if it is pursued under ACUS guidelines, ensures adequacy of representation of affected groups. Thus it provides its own form of political accountability, which probably is greater than when the agency makes rules unilaterally. Thus negotiated rulemaking avoids the problem of unaccountable decisionmaking that the delegation doctrine is intended to avoid.

It bears emphasizing that the delegation doctrine overlaps other requirements imposed on agency decisionmaking under the APA and substantive statutes. In a real sense, delegation problems are avoided when rules are subject to judicial review under APA standards. In other words, the delegation doctrine is embodied in APA requirements and need not be addressed separately.

There are thus two entirely independent ways for negotiated rulemaking to satisfy the delegation doctrine. First, if the rule ultimately resulting from negotiated rulemaking passes judicial scrutiny under the arbitrary-and-capricious, within-statutory-authority, and in-accord-with-statutory procedures standards, it perforce has passed muster under the delegation doctrine. Second, if the affected interests have been represented fairly in the negotiation process, political accountability exists, and there is no need to be wary of delegation because the harm it seeks to avoid has been avoided ab initio.

*Id.*

Nevertheless, Harter has raised the concern that negotiated rulemaking may contravene the policy against *ex parte* communication contained in the Administrative Procedure Act.[122] Perritt successfully counters Harter's concerns in his report to the Administrative Conference of the United States and concludes, based in part on his own analysis of the results of the EPA demonstrations, that *ex parte* contact will be found permissible by a court.[123] In addition, Perritt argues a balanced selection of interest representatives, consultation focused solely on policy rather than factual matters after the record is closed, and the placing of summaries of the negotiations in the record are likely to satisfy the court. According to Perritt, caucuses and work group meetings can be closed without violating the terms of FACA. Since EPA gave notice of all of its full negotiation sessions, it complied with its FACA charter and the Sunshine Rules. However, EPA may not have met all the relevant notice requirements for some of its subcommittee meetings.

In some respects, negotiated rulemaking efforts cannot fail. At the very least, conflicts can be clarified, data shared, and differences aired in a constructive way. Even if full consensus is not achieved, the negotiation process may still have narrowed the issues in dispute. While the issue did not explicitly arise in either EPA demonstration, the question of what would happen if consensus was not reached was very much on the minds of the participants. Most of the participants indicated that they thought the Agency would not ignore even partial agreements when fashioning the final rule, in order to head off some of the legal challenges that might otherwise occur.

## V. Reflections on the Success of Negotiated Rulemaking

In retrospect, EPA appears to have made a number of important decisions that helped to ensure the success of its first two demonstrations. Most of these decisions focused on the processes involved in conducting such a demonstration, an area little addressed by either proponents or critics of negotiated rulemaking. Yet these decisions appear crucial to the success and legitimacy of EPA's demonstrations. First, EPA designated one portion of the Agency to manage the negotiations process while relying on a separate section of the Agency to represent EPA's interests in the negotiations. Second, EPA worked hard to establish a resource pool that the participants themselves were allowed to manage. Third, the Agency focused on the drafting of a written agreement. Fourth, EPA gave the facilitator substantial latitude and independence.

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[122] Harter, *Cure for Malaise*, *supra* note 7, at 12, 22.

[123] A rule ultimately adopted by the agency must be supported by factual information contained in the official record. Persons with an interest in the content of the rule must be afforded an opportunity to know the factual basis for the rule and to challenge facts submitted by opponents in an adversarial context. If the negotiation takes place among appropriately balanced interest representatives, the opportunity for adversarial exploration of policy and factual issues is preserved in the negotiation itself. Consultation between the agency and the negotiation participants after the "record" is closed should be permissible so long as such consultation focuses on policy rather than new factual matters. Placing summaries of discussions in the "record" so that non-parties to the discussions can know of their substance and have an opportunity to respond, while not necessary in every case, enhances the likelihood that the *ex parte* contact will be found permissible by a court. H. Perritt, *supra* note 27, at 171-73. *See also*, Note, *supra* note 1, at 1871-89.

EPA made a crucial decision to designate the Office of Planning and Program Evaluation (OPPE) to coordinate its negotiated rulemaking demonstrations. It is not likely that these functions would have been handled as credibly by a section of the Agency which had to function at the same time as an interested party in the negotiations. The individuals in this office played a key role in educating others in the Agency about the negotiated approach to rulemaking. OPPE staff selected a convenor and solicited proposed rules from all sections of the Agency, and it worked to ensure that the top leadership at EPA understood the risk involved and would throw its weight behind the effort.[124] The same central staff contracted with an outside evaluation team to ensure that there would be an independent analysis of the results.

The resource pool also proved an important factor for success. OPPE staff worked extremely hard to assemble the funds for a resource pool. Because of the many unanswered questions surrounding the issue of intervenor funding, EPA thought it wise to raise private foundation funds to supplement the Agency's contribution to the resource pool.[125] Once the

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[124] The active backing of top EPA officials was identified as one of the most important conditions for success in the first EPA demonstration. Significant barriers to implementing the demonstration emerged whenever "12th floor" support flagged. There needs to be top level pressure on the EPA Program Offices to suggest candidate rules and to clearly define the process they will use to incorporate the product of negotiated rulemaking efforts into a NPRM; on hesitant stakeholders to encourage their participation; on the EPA Office of General Counsel to move quickly and authoritatively to resolve resource pool-related uncertainties such as the intervenor funding question; on OMB to define clearly and publicly its role in the funding process; and on the EPA "team" to ensure OMB's good faith participation in the negotiations and to ensure a speedy regulatory review of the consensus statement and NPRM.

[125] In July 1984, Philip Harter prepared a memorandum for the NCP negotiating committee regarding intervenor funding and conflict of interest statutes entitled Advisory Committee Members and the Federal Conflict of Interest Statutes *reprinted in* L. Susskind & G. McMahon, *supra* note 30, at app. C.

Drawing on the Susskind & McMahon report, Wilson writes:

> Doniger (staff attorney at NRDC and the environmental representative at the NCP regulatory negotiations) reported at the July meeting that he had not yet drafted the position paper on compensation, as he was still awaiting the results of legal research being conducted independently by Philip Harter. At this point NRDC was not alone among negotiation participants who felt that, with limited funding, they were not on an equal footing with other groups having larger in-house technical and research resources; but NRDC was the only one actively

funds were in hand, EPA agreed to turn them over to an independent body to hold. By working with the participants to develop guidelines for the use of these funds, EPA not only assuaged some of the parties' concerns about having too few resources to participate effectively, but it also underscored the Agency's commitment to the negotiation process.

In the first demonstration, the NCP negotiating committee used over $10,000 from the resource pool to fund an independent study of a proposed engine testing plan. Other collaborative technical work was done by committee members who designed a microcomputer-based spread sheet model to test the impacts of penalty formula parameter changes on penalty fees.[126] In the eyes of the participants, this joint modelling effort was absolutely crucial to the success of the negotiation.[127] It avoided the typical pattern of adversarial science—each side calling on its technical experts to discredit the work of the others.

Working from a single negotiating text proved important in focusing the negotiations. In the first demonstration, EPA asked the participants to produce a statement of policies that would guide the Agency in formulating the specific language of the rule. In the second demonstration, the

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pushing for per diem compensation as the answer to redressing the balance. The implications of this situation for the future success of the NCP negotiations were disturbing. About half of the manufacturing representatives still opposed compensating NRDC from the resource pool. But NRDC was the only environmental group represented on the negotiating team, and Doniger still had not signed on formally as a participant. 'Indeed, he gave every indication that he would not sign on until his interests regarding compensation were met' (especially the long term concern about funding that is replicable, doesn't cut into NRDC's normal fundraising pool, and doesn't conflict with NRDC's by-laws regarding receipt of funds from groups with possible conflicts of interest).

Harter's paper on compensation issues under federal administrative law was available by the time of the next resource pool subcommittee meeting on July 26, but its length and level of detail was such that it raised many more questions than it answered. In the meantime a separate issue had arisen as to whether even the participants' direct expenses (i.e., travel, room and board) could be reimbursed out of the federal portion of the resource pool without being considered 'intervenor funding' (which would then subject individual members to restrictions on their future freedom to represent their own organizations in the NCP rulemaking for fear of 'conflict of interest'). At this point the subcommittee decided to try a different tack and draft a letter to EPA Deputy Administrator Alm requesting that the agency itself act quickly to resolve the compensation and related conflict of interest issues. It also subsequently decided to 'borrow' funds from the private side of the resource pool to cover members' out-of-pocket expenses until the needed EPA guidance on appropriate use of federal funds was forthcoming.

In fact EPA never did resolve these important procedural questions or provide the NCP negotiating team any final guidance as to how they should be handled. After the July 26 subcommittee meeting no further mention is made of compensation or intervenor funding in the Harvard documentation of the NCP regulatory negotiation. In the end everyone, including NRDC, simply allowed these issues to go away. Still unanswered, however, is David Doniger's contention that the long term feasibility of participation by non-profit organizations in regulatory negotiations will be severely limited without some form of per diem compensation.

Wilson, Report on Regulatory Negotiation § III, at 5-6 (draft of September 24, 1985) (prepared for National Science Foundation).

[126] L. Susskind & G. McMahon, *supra* note 30, at 155-56.

[127] L. Susskind & G. McMahon, *supra* note 30, at 156-58.

Agency asked the participants to draft the actual language and the preamble of the proposed rule. EPA was also careful not to promise more than it could deliver. The final drafts had to go through the normal review and comment process, so EPA could not promise that the negotiated drafts would be the rules that were actually promulgated. As it turned out, the relatively few comments received did not require EPA to alter the language of the draft rules at all. Had the comments been more extensive, EPA was prepared to meet again, informally, with the members of the committees to discuss the changes that it was intending to make.[128] Because such a meeting was promised, the participants felt that their efforts to negotiate a written draft of the proposed rule would not be ignored.

To avoid any potential misunderstanding about the consensus document, EPA and the facilitators attempted to make certain that everyone knew what they were doing when they signed the final drafts of the proposed rules. They were committing themselves in the first demonstration and their organizations in the second demonstration. In both cases they were agreeing to support the draft during the review and comment period and, if it were not changed, after that as well. By making the written document the focus of the negotiations, EPA was able to focus all the energies of the participants on a shared task.

Finally, use of a skilled facilitator proved essential to the success of the project. EPA made a decision to rely on a non-partisan convenor to explain the negotiated approach to rulemaking to potentially interested stakeholders. As the sponsoring entity, EPA knew its motives were likely to be suspect. The active mapping of stakeholders and the solicitation of their involvement was crucial to ensuring adequate representation of all interests.

The skilled facilitators involved in the two demonstrations managed the actual negotiation processes. The Agency knew it was not in a good position to referee conflicts among the participants, even when such disputes threatened to bring the whole process to a halt. EPA used facilitation teams to ensure that those managing the process had both the facilitation skills and the substantive knowledge to help the process along. In the first demonstration, ERM-McGlennon relied on a pair of senior staff members. In the second demonstration, the Assistant to EPA's General Counsel worked in tandem with the ERM-McGlennon staff. This ensured that the lessons of the first demonstration were not lost.

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[128] Had the comments been more extensive or more critical, it probably would have meant that a key participant had not been at the bargaining table.

The facilitators took the lead in generating agreement on a detailed agenda and work schedule, organizing a subcommittee meeting at which components of the final version of the rule were drafted, and convening the full group to review subcommittee drafts. The facilitators took responsibility for the preparation of detailed minutes of all meetings and the complete draft of the final rule. The degree of facilitator involvement, however, varied in the two demonstrations. The ERM-McGlennon staff, having a great deal of mediation experience, tended to be more active than the EPA facilitator. They maintained frequent contact with all participants, intervened quite actively during several of the meetings, and tended to initiate a variety of activities, including caucuses during and outside of meetings.[129]

The facilitators task was not over once the draft agreements had been prepared. ERM-McGlennon played a central role during the first demonstration in ensuring that the parties checked back with their constituents and that needed changes were agreed upon by the entire committee. Indeed, the facilitation team may be central to the entire post-negotiation phase of the negotiated rulemaking process. The participants may designate the facilitator, as a non-partisan outsider aware of their intentions, to be the person to monitor the draft rule as it proceeds through the final steps of promulgation. The facilitators played such a role in both EPA demonstrations.

In interviews after the demonstrations were completed, the participants in both negotiated rulemaking efforts indicated that they had become advocates of further demonstrations.[130] Indeed, several urged EPA to proceed with further demonstrations (which, at this writing, the agency has done).[131] The participants felt that the openness of meetings; the availability of minutes and written subcommittee reports, as well as drafts of the final agreement; and the presence of all the relevant stakeholders at the table ensured the legitimacy of the negotiated agreement. While it is too soon to make a final judgment and there are too few data available to calculate formally the cost-effectiveness of negotiated rulemaking, the two demonstrations suggest that in a cooperative setting the pooling of views, experience, and knowledge can produce a rule that is considered by those directly involved to be more legitimate than what the Agency might otherwise have drafted on its own.[132]

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[129] L. Susskind & G. McMahon, *supra* note 30, at 126, 171-75; L. Susskind & D. Kronenberg, *supra* note 30, at 147.

[130] L. Susskind & G. McMahon, *supra* note 30, at 129-148.

[131] EPA has recently begun a third demonstration, involving the development of a rule on migrant farmer working conditions. Notice of Intent to Form an Advisory Committee, 50 Fed. Reg. 38,030 (1985).

In light of this clearly superior outcome of negotiated rules, the courts should be urged to evaluate the regulatory negotiation process in a more favorable light. Within the conventional rulemaking process, courts have undertaken an oversight role designed to induce agencies to conduct better research, pay attention to the concerns of those with a stake in the rule and exhibit analytical rigor in promulgating a final rule.[133] The so-called "hard look" doctrine, adopted by the courts during the last decade, is intended to make sure that agencies provide a reasonable analytical justification for rules.

The products of negotiated rulemaking do not warrant the usual "hard look". The rationale behind the hard look doctrine will be satisfied during the negotiations themselves if the following key conditions are adhered to: 1) adequate notice; 2) availability of financial resources to disadvantaged groups to help them participate on an equal footing; 3) the keeping of a reasonable record of formal meetings; 4) ample opportunity for all parties to review the final draft; 5) an opportunity for all parties to discuss the results of the review and comment process; 6) a chance for all interested parties to shape the scope of the negotiation agenda, agree on the selection of a facilitator, and receive access to the information they request; 7) a clear explanation by the agency of its obligation to the negotiating committee; and 8) an opportunity for all parties to sign off on a final version of the agreement. If these elements are incorporated in the negotiations process, the participants themselves will ensure that the Agency addresses their concerns, conducts adequate research, and carefully analyzes all proposals in choosing the best one. Thus, the judicial hard look doctrine would be redundant.

In short, a different standard of judicial review would help to ensure the efficiency and perceived legitimacy of the rulemaking process. Courts should insist on substantial reasons for granting judicial review of a rule that meets the eight conditions listed above. If information was falsified or the agency failed to promulgate the rule as negotiated, judicial review would certainly be justified. However, if a party were offered a chance to participate in a full-fledged negotiated rulemaking effort, but chose to remain aloof, the courts ought to respond skeptically to a request for judicial review. If the courts adopted this posture, the incentive to participate in negotiated rulemakings would be enhanced. This would, in turn, increase the odds of a workable consensus being reached and reduce the likelihood of legal challenges to subsequent rules. Of course, challenges to rules based on claims that fundamental rights have been abridged would still be heard as always.

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[132] *See supra* text accompanying notes 46-49 for discussion of the characteristics of a legitimate rule.

[133] Harter, *Consensual Rules, supra* note 11, at 471-85. Judicial review, in effect leads to a second round regulation, which is often produced through a settlement agreement. For a description and critique of the role of settlement agreements in the informal rulemaking process, see Gaba, *Informal Rulemaking by Settlement Agreement*, 73 Geo. L.J. 1241, 1241-82 (1985).

Judge Patricia Wald of the U.S. Court of Appeals for the D.C. Circuit has suggested that the judicial role in reviewing negotiated regulations should not, and will not, be passive.[134] This is certainly a reasonable position, but once an active review has determined that the eight conditions suggested above have been met, the courts should realize that continued second-guessing of the results of negotiated rulemakings will undermine the prospects for using this particular regulatory reform to enhance the efficiency of the rulemaking process and to restore a measure of legitimacy to the outcomes of the process.

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[134] Wald, *Negotiation of Environmental Disputes: A New Role for the Courts?*, 10 COLUM. J. ENVTL. L. 1, 17-25 (1984).

# APPLYING ALTERNATIVE DISPUTE RESOLUTION TO RULEMAKING

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## OWEN OLPIN

Most of the talk at today's Colloquium seemed to concern negotiation and arbitration as an alternative to litigation. This article looks at a different kind of alternative. Instead of negotiation as an alternative to a lawsuit, we will discuss negotiation as an alternative to the classic way regulations have been drawn by administrative agencies. The classic form entails an agency retiring to the quiet of the cloister, writing draft regulations, putting them out for public comment,[1] receiving largely adversarial comments, and then promulgating a final rule.[2] In arriving at a final rule, the agency traditionally takes into account written comments and testimony at hearings. In the Environmental Protection Agency's (EPA) experience, the process proceeds to inevitable, or almost inevitable, litigation after the final rule has been promulgated.

Negotiated rulemaking is a different way of starting that process. Instead of the draft regulation for the *Federal Register* being drawn in the cloister by the agency, regulatory negotiation contemplates a mix of

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[1] *See* Administrative Procedure Act, § 4(b), 5 U.S.C. § 553(b) (1982) (requiring notice of proposed rulemaking and giving interested persons an opportunity to comment).

[2] *See id.* § 553(c) (requiring agency consideration of public comments before promulgation of a final rule).

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interested parties meeting and negotiating to begin the rulemaking process.[3]

An important footnote is that in negotiated rulemaking there is not an abdication of responsibility by the agency. The agency's role in this, its statutory responsibility, is not forfeited.[4]

There are important issues in discussing regulatory negotiation. They include selecting appropriate candidates, convening the negotiating panel, and actually negotiating the proposed rule.

The first issue is selecting appropriate candidates. The selection process for negotiated rulemaking is something that was worried about back in 1982. There were thoughts about what those candidates would be, what their earmarks would be, and what might work. Some ideas were developed that seem to have stood the test of time reasonably well. It is important to have a discrete rule that will be promulgated within a set period of time, thus providing a deadline and assurance of what will occur if a rule is not negotiated.[5] The subject matter of the negotiation has to involve an interest that can be identified and one which has persons who can act as credible representatives for those interests. The representatives have to have the respect of those involved with the interests, the ability to communicate with them and to, in effect, commit them to the result.

The issues involved have to be issues with some possibility for compromise. There has to be the possibility of coming up with trade offs in order to get to a result. You cannot ask someone to compromise on a basic tenet of his philosophy — you ought not ask that biology curriculum be negotiated by a confirmed believer in evolution and by a fundamentalist Christian; neither of them will be able to make any concessions and nothing will be achieved.

An additional element in selecting the appropriate candidate is the size of the negotiating group. How many people can sit around a table and engage in this kind of negotiation? This question has purportedly been answered by Philip Harter, but the Harter rule has proven to be bankrupt. Mr. Harter argued that only fifteen persons could sit around a table and negotiate effectively. In the recent asbestos regulatory negotiation, however, we had twenty-five persons and it worked. Mr. Harter has had groups of about twenty-four or twenty-five, where he has been the facilitator, that have proven workable. The sound scientific basis for the Harter rule of fifteen, which is even mentioned in ACUS Recommendation No. 82-4, was Mr. Harter sitting in a conference room thinking to himself about how many people could meaningfully participate in the process. He counted chairs around that particular conference table and concluded that fifteen was all that could be accommodated.[6]

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[3] For a negative response to alternative dispute resolution, see Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984). Fiss argues that "most ADR advocates make no effort to distinguish between different types of cases or to suggest that 'the gentler arts of reconciliation and accommodation' might be particularly appropriate for one type of case but not for another." *Id.* at 1089.

[4] *But see id.* at 1078-79 (claiming agency's authorative consent difficult to pinpoint). Fiss' basic argument is that too many disputes are not between individuals, but are public disputes. As public disputes, they should be worked out in the public arena of litigation. *Id.* at 1087-90.

[5] *See* Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 47 (1982) (noting that it is human nature to procrastinate until action is necessary, and agruing that negotiations work best where decision will immediately be made by someone else if group is unable to decide).

A second important issue in negotiated rulemaking is convening.[7] A lot of work goes into deciding who will negotiate and what interests each will represent. Innumerable telephone calls are made over a period of weeks trying to discover who cares and who has an interest. Once you have found out whether someone has an interest, then the question becomes: Who speaks for that interest group? Who are regarded as the intellectual leaders? Who has credibility for the environmental interests, school interests, labor interests, asbestos manufacturers' interests, and the general public's interests.[8]

There is no purpose to be served in trying to exclude persons or groups with bona fide interests. The entire emphasis is inclusion, not exclusion. The process will have no credibility if the first salvo of public comments rings with "We do not believe in this process; it shouldn't be supported because important groups were not at the table."[9]

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[6] *Id.* at 45. Harter readily admits that the number fifteen is not written in stone, but is only a "rough practical limit." *Id.* at 46 n.257.

[7] In order to secure participation and to avoid later claims of bias, Harter argues for the use of an organization to "convene" the participants which is different from the agency that will finally issue the regulation. *Id* at 70. He first suggests the President's Task Force on Regulatory Relief, an arm of the Office of Management and Budget, as an appropriate convenor. He cautions, however, that such perceived close ties to the White House could discourage confidence in the credibility and independence of the proceedings. Instead, he proffers use of the Federal Mediation and Conciliation Service, or even the Administrative Conference. *Id.* at 70-71.

[8] *See id.* at 52-53 (observing "careful judgment must be exercised to determine which interests are so central that the regulation could not be developed without their participation and which interests are so remotely affected that their participation should be limited to written comments or other limited methods").

[9] *See id.* at 54-55 (recognizing that "to be an effective representative, the individual must have sufficient stature with the constituency he represents to adapt to changing situations in the negotiations and to bargain accordingly while retaining the confidence of his constituency").

The inclusion philosophy, at least in the asbestos negotiation,[10] pervaded the entire process. The negotiation not only had large meetings, but also broke up into small work groups and caucuses. All types of activities were going on all the time in an effort to work out problems and bridge impasses. Everyone, including the negotiators, recognized the sheer folly of not grabbing someone who had an opposing point of view and getting him or her involved in a caucus. The name of the game throughout was compromise, compromise, compromise. The purpose is to search for a solution that all parties can live with, not one that everyone might like, but one they would be willing to accept and live with.

The third important area in the negotiated rulemaking process is the negotiation process itself. This process is two-fold. The first question is what measures success in this process - what is the ultimate goal? Consensus is a possible answer. Although the negotiators do not vote, they try to hammer out their differences, the end result being a consensus of the interests that are at the table. This does not mean that everyone who has an interest must agree, but instead that the participants have reached a consensus by making all the trade offs that need to be made in order to say that this is the rule that should be published in the *Federal Register*.[11]

It is a gamble to require this type of consensus. All the regulatory negotiations that have been branded successful in the past did not achieve consensus in the strictest sense. Nonetheless, groups that did not achieve that pure form of consensus are regarded as having been successful because their product has been published in the *Federal Register* as an acceptable beginning point in the view of the vast majority of those who were involved. One option is for each negotiating group to, at the outset and in its protocols, decide what it considers "consensus"[12] to mean for that particular negotiation.

In conclusion, it is important to keep in mind that the agency is there at the table negotiating along with all the other representatives of interests on the negotiating committee.[13] The agency, however, bears particular responsibilities and burdens. Someone who is senior in the agency, someone who has substantial credibility, who can deliver on a commitment, and who is willing to deal with the agency's constituency and come back with answers is essential to the process of negotiated rulemaking.[14] In our particular negotiation on the asbestos regulations, for example, the EPA representative was very strong. She agreed that one of her constituencies was the Office of Management and Budget (OMB), and explained that she had to give everyone a good idea whether these rules would fly at OMB.

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[10] For a detailed study of a regulatory negotiation, see Sachs, *An Alternative to the Traditional Rulemaking Process: A Case Study of Negotiation in the Development of Regulations*, 29 Vill. L. Rev. 1505 (1984).

[11] *See* Harter, *supra* note 5, at 35 (noting consensus standards are often basis of mandatory regulatory requirements).

[12] Harter defines a "consensus" as a general agreement. In such an agreement, "positions are weighed, not counted." *Id.* at 93.

[13] *Id.* at 57 (recognizing agency is indisputably party in interest).

In addition, the agency is also a source of of expertise. In the asbestos negotiation, the negotiation group was provided with seminars. The EPA made experts available to the group to help them understand the difficult technical issues with which they would have to deal.

### DAVID DONIGER

One obvious problem that negotiated rulemaking presents for the public interest community is financial resources. The traditional forms of participation in rulemaking are not very expensive for the agency or the non-governmental participants. They may not be all that effective, but they are not very expensive.

Two negotiated rulemakings, one involving creating a formula to calculate penalties for truck makers who make engines not meeting standards under the Clean Air Act,[15] and the other for emission standards for wood stoves,[16] exemplify a problem area related to cost in negotiated rulemaking. Negotiated rulemaking is a time-consuming process.[17] I must have put in 30 full days on the woodstove rule, for example, and by contrast I probably would have put in three days writing comments on the draft rule for traditional rulemaking.

It is true, of course, that the written comments would not have been as effective as the insights I was able to bring to, as well as gain from, the negotiated rulemakings. Yet traditional methods would not have taken as long. Even litigation is not very time consuming. An appellate brief can be written in a week or two. If you win, the case is compensated at the prevailing rate in the community for attorneys.

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[14] Harter agrees with this view and has stated that the agency representative should be able to tap agency resources and have the power to make the requisite decisions. *Id* at 66.

[15] Clean Air Act, 42 U.S.C. § 7521 (1982).

[16] *See generally* Clean Air Act, 42 U.S.C. §§ 7401-28 (1982) (discussing air quality and emission standards).

[17] For the full history of this early regulatory negotiation, see Susskind & McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133, 143-150 (1985).

In the first one or two experimental rulemakings, no parties wanted to be the group that said "No, we won't participate because of resource problems." No party wanted to be the group that soured the experimental process. In these two negotiated rulemakings, we drew upon our own budgets. But we have now tentatively decided to draw the line and refuse to enter into a negotiated rulemaking unless there is some form of compensation for the time and the expertise expended.

We do acknowledge, however, that regulatory neogotiation can be a process which, when used appropriately, serves all interests and also economizes, if not on the government lawyers' time, then possibly on the amount of uncertainty that the government has to live with.

For this reason, regulatory negotiation should be funded out of some sort of government pool for the parties that come from the public interest sector. Those not having the resources to maintain involvement in these types of negotiations on a sustained basis should be funded first.[18] The money should not, however, come from the companies involved on the other side of the issue under negotiation. The appearance of having been influenced should be avoided to keep negotiations credible to observers.

In addition to appropriate funding, another important condition for success in negotiated rulemaking seems to be that there must be a reason that the industry involved actually wants a final rule on the subject at issue.[19] In the typical instance, industry does not want a regulation at all. So if the industry could avoid any outcome or could cause a delay or complicate the rules, it would use the negotiation process for these purposes. Yet there is a small class of rules for which the alternative of not having a rule is worse for industry than having a rule issued. For example, the truck makers felt that the nonconformance penalty regulation was in their interest. Without it, if plans to meet new emission standards went awry, the industry might not have been able to sell their nonconforming engines. Likewise, the wood stove makers worried that certain states were beginning to set up their own regulatory programs. These producers make products to sell in fifty states and shudder at the thought of having to conform to five or six different state regulatory programs.

My theory on why the pesticide negotiation went forward was that the industry wanted some reforms in the basic pesticide registration process.[20] Industry may have thought that clearing out some of the hurdles in the emergency process would either pay off directly or lend it enough credibility and goodwill that industry could get somewhere with other issues. There may, however, be other explanations.

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[18] *See* Fiss, *supra* note 3, at 1078 (criticizing negotiations because imbalance of financial resources causes unequal bargaining power).

[19] *Cf.* D. Martin & W. Schwartz, Deregulating American Industry (1977) (comparing advantages and disadvantages of deregulation).

Finally, it is often difficult to have the ideal elements in a regulatory negotiation. The first proposal that I encountered was negotiating the siting criteria for low level hazardous waste disposal sites.[21] This proposal violated many of the ideal criteria: identifiable parties, identifiable spokesmen, any kind of rule of fifteen or fifty, and the rule against talking about fundamentals.

### MADELEINE CROHN

One key element of regulatory negotiation is the creation of a resource pool. This is a fund used to support special needs of individual parties and the negotiating group as a whole. For example, some parties cannot afford the considerable travel and subsistence to attend meetings, yet without their participation there can be no meaningful negotiation. Additionally, some parties lack the resources to assess technical and scientific data introduced by other interests or the sponsoring agency. These parties will be understandably reluctant to join the negotiation unless they feel they can obtain expert advice and be fully informed. Finally, the group as a whole may need technical assistance from time to time and will want a funding mechanism for that purpose.

The term "resource pool" accurately describes how this mechanism works. Funds from the federal agency and private sources are pooled in an account managed by a neutral organization for the use of the parties. Normally, the federal agency contributes funds, unless a specific statutory prohibition exists. The EPA and Federal Trade Commission (FTC) have done so, thus playing a critical role in testing this concept. Parties to a Department of Interior (DOI) negotiation created a pool on their own because the agency would not do so.

The availability of private funds has been valuable during the experimental regulatory negotiations to date.[22] Non-governmental funds help ensure that the pool is perceived as a neutral mechanism not controlled by the sponsoring agency. They also provide for flexibility when an agency must impose restrictions on the use of federal funds. Our organization, the National Institute for Dispute Resolution (NIDR), has contributed its own private funds, managed the pools for the EPA and FTC negotiations, and helped raise money from other private sources. For the DOI negotiation, we contributed funds in the form of a matching grant to a pool managed by the mediators.

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[20] *See* Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 (1982) (providing for mandatory arbitration).

[21] Solid Waste Disposal Act, 42 U.S.C. § 6921 (1982).

[22] For a discussion of the impact of economic factors on the implementation of justice, see Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973).

How the pool of funds will be used is one of the first things the negotiating group decides. This is not determined by the agency, although the agency may have to place some restrictions on how federal funds are used. The parties, usually at the first organizing meetings, are asked to develop a consensus on a set of protocols to guide the disbursement of funds. This is a valuable exercise at this early stage, as it is very helpful to focus on a common need before getting to the complex substantive issues.

A question for the future is how routinely and at what cost resource pools should be established. Some argue that federal agencies should not underwrite this type of funding.[23] We believe, however, that all federal agencies should be authorized to create resource pools and contribute funds to them.

### STEVEN SCHATZOW

The negotiation process yields several additional advantages to all groups involved: the government, public interest groups, and industry. It is often a tremendous educational opportunity for environmental and labor groups, who often lack technical background, to be able to participate in this type of arena. These groups can gain access to resources, listen to technical experts, and judge for themselves what will be beneficial to their cause.

Although environmental groups have been very successful in litigation against government agencies, that success has been predicated upon a showing that the challenged rulemaking was arbitrary and capricious.[24] Yet this trend is changing because agencies are devoting more resources to creating a "paper trail" to justify their decisions. In addition, if these groups win lawsuits, the immediate result is that the rule gets thrown out. This forces the agency to begin the rulemaking process again, adding an additional three to five years until the rule is finalized.[25]

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[23] For an analysis of the economic impetus to negotiated settlement as opposed to litigation, see Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982).

[24] *See generally* Morgan, *Toward a Revised Strategy for Rulemaking*, 78 U. ILL. L.J. 21, 22 n.6 (1978) (describing parties' complaints of delay in regulatory process).

The benefit for industry, when dealing with agencies like EPA, is the gaining of access to a decisionmaker. Although the popular belief is that industry has great access to agencies and that the general public, such as the environmentalists, have very limited agency access, this does not seem to be accurate from an historical perspective. Environmentalists have always seemed, except in the Gorsuch era, to have better access to EPA than industry. Through negotiated rulemaking, industry can gain this access by being able to sit down with a senior decisionmaker and have him or her listen to what industry has to say.

Additionally, through negotiated rulemaking industry, as well as public interest groups, can avoid excruciating internal agency reviews that can cause a rule to linger for years. Moreover, agencies themselves can attain more efficient implementation and enforcement of their regulations because the regulated community has played an active role throughout the process.

## TERRY CALVANI

As the first independent agency to try regulatory negotiation, and this being our first effort, the Federal Trade Commission has limited advice to offer. But a few points should be stressed regarding the starting of the process. First, although the Federal Advisory Committee Act[26] (FACA) does not require a two-step *Federal Register* notice, we have used it. It turned out that the two-step notice process was a good choice, notwithstanding the additional efforts required of the convenors to identify all possible parties who might have an interest in the proposed rulemaking. We identified everyone and got them together by using the additional *Federal Register* notice to describe tentatively where we were going. When we found there were groups that we had not included, we were able to rectify what might have been a critical mistake very early.

Second, while I am not familiar with the literature on the optimum number of committee members, we have twenty-five members, and our experience is that any larger number would be very difficult to work with. Thus, twenty-five may be pushing the upper limits, and a smaller number would certainly be more practicable.

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[25] Cormick, *The "Theory" and Practice of Environmental Mediation*, 2 ENVTL. PROF. 24, 25, 28 (1980).

[26] Federal Advisory Committee Act, 5 U.S.C. app. §§ 1-15 (1982) (requiring close scrutiny of advisory committees by Congress and the executive branch).

## DISCUSSION

### A. APPLICATION OF THE FEDERAL ADVISORY COMMITTEE ACT

*Question*: How does the Federal Advisory Committee Act affect the use of non-governmental standards groups?

*Mr. Olpin*: The Federal Advisory Committee Act was something worried about back in 1982. Up until this point, however, it has not been a significant problem. The constraints of the Act, such as public meetings, have so far been honored. The public has been invited to come, and the press has largely been bored to tears because the rules get so technical and detailed. Only the trade press seems to have a particular interest in what is involved in these negotiations.

For example, the asbestos negotiations were open to the public. The work groups, where participants are divided into subgroups, could be held behind closed doors under FACA so long as you did not let them make final decisions. In the asbestos negotiation, we were not even tempted to think about closing the doors of the work group meetings.

*Mr. Doniger*: In my experience, it has been very important that the process be open. But there is not usually much of a problem with keeping the meetings open. If you are working behind closed doors, you will merely generate more interest than when open meetings are held. The subject matter is so technical that anyone other than the directly interested persons is not likely to understand the proceedings.

### B. INCLUSION OF ALL PARTIES IN THE PROCESS

*Question:* The problem for the United States Department of Agriculture (USDA) is that industry wants rules promulgated and the environmental groups are in attendance at the public hearings,[27] but it is difficult to get the small dairy farmer to participate in the negotiations.

*Mr. Eisner*: There are two aspects to this question. First, it is important to note that in traditional rulemaking,[28] the government, through the agency administrator or secretary, issues notices of proposed rulemakings for public comment. This allows all interested parties to comment under the APA.[29] There is no authority to waive this requirement in negotiated rulemaking, although the negotiations may permit a shorter comment period, and perhaps result in fewer comments being filed. With this the system may appear less adverse to the "small farmers."

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[27] *See* Harter, *Dispute Resolution and Administrative Law: The History, Needs, and Future of a Complex Relationship*, 29 VILL. L. REV. 1393, 1406 (1983-84) (stating that in ideal model, agency would publish notice in *Federal Register* inviting parties not represented to come forward).

[28] The APA provides the process for rulemaking, which may be characterized as consult, draft, consult, and publish. *Id.* at 1403.

[29] *Id.* at 1406.

Second, the general process used for the negotiations is a two-step process. Step one requires placing a notice in the *Federal Register* listing the potential parties.[30] Some parties identified may have a very obvious involvement in the negotiations.[31] But if there are representatives of small farmer groups or consumer groups that want to participate, it is incumbent upon them to contact the agency during this step, thus making the agency aware they want to help negotiate the rule.

*Mr. Olpin*: The Environmental Protection Agency has reached out in this area. EPA convenors have called and asked who ought to be present. Additionally, the convenors called trade associations and labor groups to see if they were interested.

*Mr. Schatzow*: The problem may also be that the kinds of rules at issue are not appropriate candidates for regulatory negotiation. The notion has been to take rulemakings that are perceived to be controversial to begin with. Thus, there will be different interest groups who are going to take different viewpoints.

*Mr. Doniger*: The small dairy farmer example is an instance where public interests could be dealt with within a regulatory negotiation by affirmatively seeking out these people. If there were funds available, they could be used to empower these parties to sit at the negotiation table. Institutionalizing a small business, the small farmer "little guy" role, into the procedure is a possible alternative.

*Ms. Crohn*: One important aspect of the use of regulatory negotiation is education. Those parties who until now have not participated in these types of processes have generally tended to do one of two things: either entirely ignore the regulations or fight them. By ensuring there is an improved way to deal with some of the problems in promulgating regulations and eliciting comments, we will increase the amount of participation and involvement in the regulatory process.

### C. The Agency Acting as Facilitator and Party

*Question*: Is the agency always a full-fledged party or is there always an outside party?

*Mr. Olpin*: The agency has always sat at the table, and a senior agency person has been a member of the negotiating committee.[32]

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[30] *Id.* at 1406.

[31] *Id.* at 1406.

[32] *See* Harter, *supra* note 5, at 66 (arguing that agency representative should be

There has only been one instance where an agency facilitator was involved. In that instance it worked very well because people were able to view the agency as performing two disparate functions.

*Mr. Doniger*: One possible problem with the process is the potential for agencies to retreat to a passive role, even if they are at the table, and ask the parties to reach conclusions on their own.[33] In the first of the negotiations I was in, it was necessary at some point for all the parties to get angry at the fact that EPA was laying back and not playing the role of an advocate. This is so important because EPA has tremendous technical resources.[34] The Agency then responded and played a much more active role.

In the wood stove negotiation, the agency's team leader and his whole team were remarkably good at preparing focused information for everyone to use as a neutral resource. Also, here the Agency was drawing conclusions and becoming an institution with a point of view.

The regulatory negotiation process may, however, help institutionalize the conversion of EPA to something other than an environmental advocate. In the purest model of regulation, the agencies are the representatives of the public interest. The agency should not come to view its mission as somehow brokering a deal between whatever the environmentalists want and whatever the oil industry, pesticide industry, or other interest groups want.

## D. Agencies Setting the Agenda

*Question*: What is the appropriate point in the process for the agency to set out its own agenda.

*Mr. Olpin*: The answer to this question depends on the particular subject matter. To cite one example, in the asbestos negotiation the Agency was very forthcoming. First, the Agency came forward and said the statute specifies thirteen items that need to be resolved. It was proposed that the committee negotiate all thirteen items. The Agency also informed the committee that it would not accept air monitoring.

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relatively senior, have ability to assess and predict agency's ultimate position, and also be part of substantive division responsible for regulation).

[33] *Id.* at 59. Experience has shown that complete agency participation is essential in order for the process to be successful. *Id.* Moreover, in Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F.2d 608 (2d Cir. 1965), and later in Calvert Cliffs Coordinating Committee v. United States Atomic Energy Commission, 449 F.2d 1109, 1119 n.21 (D.C. Cir. 1971), both circuit courts stated that the agency's role is not a passive one marked by reliance on the parties to raise the issues.

[34] *See* Harter, *supra* note 5, at 66 (reasoning that agency negotiators should be able to tap all agency resources, e.g., staff, data, and experts, as if the regulation was being drawn up by agency itself).

Additionally, the Agency alerted the committee to the fact that it was not going to allow them to negotiate the certification/professional licensing issue because it had to go quickly to a final regulation due to the statutory time constraints.

The committee then effectively addressed the thirteen listed items. All parties, including the asbestos manufacturers' representatives, agreed that because of the Agency's position it would be futile to attempt to get a rule that called for air monitoring of asbestos fibers. Based on the asbestos experience, there seems to be an advantage gained by an agency clearly stating at the outset where it stands, what it will do if the negotiation is unsuccessful, what its basic starting point is, and the issues upon which it will not compromise.

The certification issue was particularly interesting. The negotiating committee, primarily the labor representatives, argued that it must look at the certification issue because it was so critical. Unless the people doing the work are trained and qualified, labor argued, the whole regime would fall apart. So the negotiations dealt with certification, despite EPA's initial inclination not to have that happen.

*Mr. Pritzker*: There have been several references to the Administrative Conference's 1982 Recommendation. Yet there was a second recommendation on the subject in 1985 when we studied the regulation. Negotiations that had taken place up until that point had not been discussed. One of the conclusions drawn from that investigation was that it is essential during the course of the regulatory negotiation for the agency to keep the other participants continually aware of what the likely alternatives are and what the likely outcome will be if no consensus is reached.[35] Considering that these regulatory negotiation proceedings are dynamic processes, the agency representative at the table has a continuing responsibility.

### E. ACHIEVING A CONSENSUS

*Question*: Does consensus always mean unanimity, and what do you do if representatives drop out along the way or make it clear that they are not going to be able to continue given the foreseeable outcome?

*Mr. Olpin*: In the asbestos negotiations, a protocol was written stating that "consensus" means everyone. When the negotiations ended there was not unanimity, yet almost all who participated would agree that the process was successful. Success was achieved despite the fact that strict consensus was not achieved on all issues. The reason for this sense of success was that EPA was persuaded that the product was good. EPA wrote an honest preamble, making it clear there was no consensus in accordance with the protocol, but that the overwhelming agreement of twenty-one out of twenty-five seemed to be an appropriate place to start. The question of how to define consensus, however, is one that is still being worried about.[36]

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[35] Even if no consensus is achieved, the negotiation process can still be beneficial in that it will narrow and better define the issues. *Id.* at 110.

*Mr. Doniger*: In some cases this question will not be resolved. In the wood stove negotiations, it was decided that if there was substantial disagreement in the end, then no consensus was reached.

*Mr. Eisner*: Let me make two points in that regard. Consensus was worried about in one rulemaking. It was decided that it would be left up to the group to define. But the group really never confronted the issue, and the mediator started the discussion. After the first issue, the consensus question seemed to be answered. The mediator, not yet wholly assured, said "Well, we appear to have consensus on this, let's go to the next issue," and no one in the group disagreed. Was that consensus? The mediator believed it was.

In addition, various groups may concede that, for a variety of reasons, although they cannot formally support a particular proposal, they will agree not to object to it. In regulatory negotiation, good judgment must be exercised. Decisions must be made, for example, as to when to accept this kind of support for a particular proposal rather than requiring formal consensus.

*Ms. Crohn*: One of the other important aspects to remember is that regulatory negotiation is still very much in the formative stages. The theory is that if all interested parties have been brought together, including the agency, a method for addressing conflicting viewpoints is in place. If the negotiation is successful, promises have been exchanged and the product is one that all parties agree with voluntarily. As a result, the parties will support that regulation because they helped shape it and they understand it.

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[36] "Consensus" is a term whose definition has never been truly qualified. Because it is basic to any agreement, it is necessary to define beforehand what a consensus will be for that particular negotiation. *Id.* at 92-93.

# Negotiation of Environmental Disputes: A New Role for the Courts?

Patricia M. Wald*

Just a decade ago, Judge Harold Leventhal wrote a landmark article entitled "Environmental Decisionmaking and the Role of the Courts,"[1] in which he pointed out that courts no longer formulated and directed the application of pertinent legal rules in the environmental area as they once had. This was true, he said, because "[p]rimary responsibility has been vested in executive officials and independent regulatory agencies" under the new environmental legislation.[2] Despite this displacement, Judge Leventhal continued, the courts still maintained "a role of review . . . of major significance." Through the exercise of review, Judge Leventhal stated, courts have exerted "a pervasive influence over the legislation's implementation."[3]

To fulfill that role, he said, a court was required to "study the record attentively, even the evidence on technical and specialist matters, 'to penetrate to the underlying decisions of the agency, to satisfy itself that the agency has exercised a reasoned discretion with reasons that do not deviate from or ignore the ascertainable

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[1] Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. Pa. L. Rev. 509 (1974). For an overview of Judge Leventhal's views on the relationship between courts and administrative agencies, see Estreicher, *Pragmatic Justice: The Contributions of Judge Harold Leventhal to Administrative Law*, 80 Colum. L. Rev. 894 (1980).

[2] Leventhal, *supra* note 1, at 510.

[3] *Id.*

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legislative intent.' "[4] According to Judge Leventhal, the court needed to insure that the agency had taken a "hard look" at the salient problems and engaged in reasoned decision-making; the decision itself must come "within a zone of reasonableness."[5] The objective of judicial review in environmental cases, he said, was "to provide supervision that emphasizes broad questions of fairness . . . . [and] to combine supervision with restraint, making the court a genuine kind of partner with the agency in the overall administrative process."[6] The courts had assumed a "central role of ensuring the principled integration and balanced assessment of both environmental and nonenvironmental considerations in federal agency decision-making."[7] In sum, Judge Leventhal saw the courts and the Environmental Protection Agency ("EPA") as engaged in a collaborative partnership in wise decision-making. Judge Leventhal's stance was an activist one: his hard look philosophy extended by implication from decision-making of agencies to the scrutiny of the reviewing courts. Although the primary duty of a court was to insure compliance with legislative intent, exploration of all salient facets of the problem and reasoned analysis were the watchwords. Like an exam grader, the court would give a pass or fail mark depending on whether the course material was covered and whether the use made of that material was acceptably intelligent.

To be sure, even a hard look court would not ordinarily raise new issues, no matter how glaring the agency's errors might be. Once issues were presented, however, a court could and often did become actively involved: it might reject the arguments of both sides, suggest compromise positions, or remand cases for the consideration of new solutions. Under Judge Leventhal's vision, a reviewing court's primary loyalty was to the Congress, which gave it the power of independent review. The agency, in turn, perceived the court as a major participant in construing and implementing the statute. An agency's efforts were often directed toward getting the court to agree with a particular interpretation or action, and its internal decisions were often predicated on the likelihood of obtaining that court's approval. The agency might, at times, actively welcome judicial review to obtain such an endorsement since a court's pronouncements embodied precedental implications for future agency policies and directions that went far beyond the immediate case.

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[4] *Id.* at 511.

[5] *Id.* (citing Greater Boston TV Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir.), *cert. denied*, 403 U.S. 923 (1971)).

[6] *Id.* at 554.

[7] *Id.* at 555.

That was Judge Leventhal writing in 1974; this is 1985. In the intervening decade, we have witnessed two phenomena that have significantly altered both the regulatory landscape and the courts' role in agency processes. First, we have seen the emergence of massively complex environmental programs whose success essentially depends on some type of collaborative partnership, not between the courts and the agency, but between the EPA and the parties it regulates. Second, the ability of the legal system to oversee effectively multifaceted environmental regulation has increasingly been cast into doubt. To some extent, this doubt is reflected in the Supreme Court's recent restrictions on the role of appellate review in the implementation of environmental statutes and other agency legislation.[8]

More generally, this skepticism is embodied in the movement among lawyers and commentators away from traditional judicial oversight through the adversary system and in the direction of more collaborative techniques of dispute resolution. As Owen Fiss recently has pointed out, this movement is so strong that it has acquired its own acronym: 'ADR' or Alternative Dispute Resolution.[9] Proponents of ADR argue that application of ADR techniques to environmental disputes will enable us to overcome a purported legal and regulatory malaise and to reinvigorate the business of safeguarding the environment.

Before adopting particular approaches, it might be is helpful to examine ADR from the perspective of an appellate judge.[10] This examination first discusses the latest Supreme Court ruling on the scope of judicial review of agency actions, and then surveys briefly the current impact of ADR techniques on environmental disputes. It goes on to explore the tools presently available to district and appellate courts sympathetic to an expanded use of negotiation and settlement. Finally, it considers in some detail two "hot topics" in what might be called "environmental ADR": the possibilities for encouraging settlements in EPA enforcement actions, and a proposal for negotiated regulations. Both of these topics directly implicate the sometimes conflicting aims of ADR and judicial review. By giving each a "hard look," the discussion raises some pre-nuptial concerns about the proposed marriage between ADR and environmental regulation, concerns that must be attended to if settlement and negotiation are to become mainstays of the agency process.

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[8] *See* Chevron, U.S.A. v. Natural Resources Defense Council, — U.S. —, 104 S. Ct. 2778 (1984).

[9] Fiss, *Against Settlement*, 93 Yale L. J. 1073 (1984).

[10] For a discussion of environmental ADR from the perspective of an attorney for the federal government see Dinkins, *Shall We Fight or Shall We Finish: Environmental Dispute Resolution in a Litigious Society*, 14 Envtl. L. Rep. (Envtl. L. Inst.) 10398 (1984).

## I. THE CURRENT ROLE OF APPELLATE REVIEW

Before discussing new roles for the courts in environmental decisionmaking, it is important to have a realistic sense of what their currently legitimized role is. During the October 1984 term, in *Chevron v. Natural Resources Defense Council*[11] the Supreme Court laid down what seems to me a quite restricted role for reviewing courts in construing environmental statutes. *Chevron* involved Clean Air Act permits for new or modified stationary sources in "non-attainment" states.[12] At issue was a 1981 EPA regulation which allowed a state to adopt a plantwide or so-called "bubble" definition of "stationary source" and departed from the prior regulation that required each emission source within a plant to be assessed independently. Neither the applicable definitions of "stationary source" in the Clean Air Act[13] nor the legislative history of the Act addressed the issue directly.[14]

The opinion emanating from our court sought to fill this gap by considering the overriding purposes of the Act. It concluded that a more liberal application of the plantwide bubble concept to states that had not yet met EPA air quality standards would run counter to the Act's core purpose of improving air quality.[15] The Supreme Court reversed, however, declaring that the "basic legal error of the Court of Appeals was to adopt a static judicial definition of the term 'stationary source' when it had decided that Congress itself had not commanded that definition."[16] Justice

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[11] 104 S. Ct. 2778 (1984).

[12] 42 U.S.C. § 7411 (1982).

[13] 42 U.S.C. § 7411(a)(3) (1982).

[14] *See Chevron*, 104 S. Ct. at 2785-87.

[15] Natural Resources Defense Council v. Gorsuch, 685 F.2d 718, 725-28 (D.C. Cir. 1982).

[16] *Chevron*, 104 S.Ct. at 2793.

Stevens, writing for a unanimous six-justice court, marked in bas relief the present parameters for judicial review of agency interpretations of statutes:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress had directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[17]

This view sounds distinctly different from the collaborative partnership between courts and the EPA Judge Leventhal was talking about. It is true that any comparison of Judge Leventhal's article and Justice Stevens' opinion is complicated by the fact that Judge Leventhal was talking mainly about agency applications of statutory terms, and Justice Stevens was discussing agency constructions of statutory language. But there is no bright line between agency application and agency interpretation of statutory terms for the purposes of judicial review. Indeed, both Judge Leventhal and Justice Stevens used the same sensitive and excruciatingly vague standard of "reasonableness" to judge agency action. And it is difficult to see the logic of allowing judges a freer hand in reviewing the evidence or expertise supporting an agency application than they are permitted in considering an agency's interpretation of the statutory wording itself. Thus, even in light of last years' "Airbags" case,[18] it is impossible for me to conclude that Judge Leventhal and Justice Stevens envisioned the same degree of judicial inquiry or oversight into agency action.

In *Chevron*, the litigants were admonished not to "wag[e] in a judicial forum a specific policy battle which they ultimately lost in the agency . . . ." Such policy arguments, the Court continued, "are more properly addressed to legislators or administrators, not to judges."[19] According to the Court, where a statute has conflicting policy objectives and "Congress intended to accommodate both interests, but did not do so itself on the level of specificity" required to give a clear answer to the statutory question, the agency deserves deference.[20]

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[17] *Id.* at 2781-82 (footnotes omitted).

[18] Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., — U.S. —, 103 S. Ct. 2856 (1983).

> Judges are not experts in the field, and are not part of either political branch of the government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress had delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.[21]

It may turn out that the Court will not pursue a role of review as deferential as its language in *Chevron* suggests. I personally conclude, however, that although *Chevron* reflects no fundamental departure from several recent pronouncements on statutory construction,[22] it is a mood piece—and the mood is a rather somber one for proponents of active judicial review of agency decisions.[23] The climate for judicial partnership in environmental decisionmaking, in other words, has cooled considerably since 1974; judges are limited partners at best. Perhaps this narrowing of judicial oversight is a response to the uncertainty and delay that a broad, far-reaching brand of judicial review introduces into the regulatory process. If so, it may well be fueled by the same fire that lights the way toward the application of ADR to environmental disputes.

Despite the reduced role of judicial review which the *Chevron* decision may portend and the growing attempt to divert conflicts from judicial resolution through ADR, environmental ADR in the form of consent decrees or negotiated regulations may actually increase rather than decrease judicial influence in environmental decisionaking; at best, ADR could replace the old problems of appellate review with a new set.

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[19] *Chevron*, 104 S. Ct. at 2793.

[20] *Id.*

[21] *Id.*

[22] *See, e.g.*, FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 32 (1981); SEC v. Sloan, 436 U.S. 103, 118 (1978).

[23] *See also* Reed, *Three Strikes and the Umpire is Out: The Supreme Court Throws the D.C. Circuit Out of the Bubble Review Game*, 14 ENVTL. L. REP. (ENVTL. L. INST.) 10338 (1984). ("In *Chevron* . . . the Supreme Court set a new tone of judicial restraint in reviewing agency action.").

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## III. JUDICIAL OVERSIGHT OF NEGOTIATED REGULATIONS AND AGENCY SETTLEMENTS

Despite their circumscribed role in promoting ADR in environmental controversies, appellate courts are likely to play a more crucial role in reviewing negotiated rules and settlements. As I mentioned earlier, negotiation typically does not eliminate court involvement altogether; instead it changes the nature and scope of the judicial role. Negotiated regulations, for example, are still subject to judicial review, and even settlements of environmental disputes that have been submitted to the courts for approval, enforcement or modification are not infrequently challenged on appeal.

### A. *The Judicial Role in Negotiated Regulations*

Perhaps the most novel and promising application of negotiation is in the initial formulation of proposed regulations. In its present form, the hybrid rulemaking process often exacerbates the worst aspects of the adversary system. It invites parties to take extreme stances in initial negotiations so that they will be positioned to challenge the rule finally adopted. The agency is often perceived as only going through the motions of considering outsider comments, having already made up its mind when it proposed the rule. Once a rule is adopted, if challenges arise, agency programmers turn its defense over to their legal staff—and the opportunity for genuine negotiation narrows. Against this backdrop, ADR proponents have suggested that direct negotiations between the agency and the various affected parties take place *before* a regulation is developed and formally proposed. Such negotiations would involve the affected parties in the regulatory process from its onset. They would presumably soften the adversary posture that animates the current comment process and reduce the inevitability of legal challenges to adopted rules. The direct participation of a wide range of groups in negotiated rulemaking would generate a sense of political legitimacy currently lacking in the talismanic invocations of agency expertise.

The idea of negotiated regulations has been endorsed by ACUS and has been experimented with by EPA and other agencies.[62] A protocol for negotiating regulations has been explored at length by Phillip Harter in a recent article in the Georgetown Law Journal.[63] Harter's ground rules would include publication of the proposed negotiation in the Federal Register, participation by those "materially affected" on submitting an application, publication of those selected for participation, an option to make the negotiations confidential, including a prohibition on the use of offers or data in later court proceedings or in response to Freedom of Information Act requests, and a "consensus" on the rule ultimately noticed for comment under regular APA procedures.[64] When so noticed, the statement of basis and purpose would not have to be as comprehensive it would under ordinary rulemaking; its main claim to legitimacy would rest on the consensus achieved by the parties.[65]

From the perspective of an appellate judge, the most interesting aspect of Harter's protocol is his suggestion concerning the "less stringent" scope of review of negotiated regulations. Harter reasons that "if individuals can boycott the negotiation group and then obtain judicial review under a stringent standard, the regulatory negotiation process could unravel."[66] Moreover, he reasons, the negotiation process will itself alter the backdrop to judicial review.[67] A need for confidentiality and the goal of ironing out differences in the negotiation process, for example, will produce a very different record from the kind we now see on appeal. And even though a negotiated rule would be submitted for general public comment after negotiations by the major, interested parties, the formal notice and comment process cannot be expected to reflect the "give and take" of an initial testing ground for regulations. Accordingly, Harter calls for a narrow scope of judicial review for negotiated regulations, one tailored to the negotiating process itself. In essence, he posits that "[a negotiated] rule should be sustained to the extent that it is within the agency's jurisdiction and actually reflects a consensus among the interested parties."[68]

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[62] *See supra* note 33; *see also* 49 Fed. Reg. 17576 (Apr. 24, 1984) (EPA announcement of an Advisory Committee to negotiate issues leading to a rulemaking on nonconformance penalties under Section 206(6)(1) (1982)).

[63] Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L. J. 1 (1982).

[64] *Id.* at 42-110. More recently, Harter has suggested that in most cases it is probably not worth the price in decreased public confidence to close the meetings of the negotiating group. (Letter to Patricia M. Wald, October 17, 1984). (Available in Columbia Journal of Environmental Law office).

[65] Harter, *supra* note 63, at 92-97.

[66] *Id.* at 102.

Harter's proposal contemplates a bifurcated system of judicial review. The appellate court would first have to determine "jurisdiction"—a multifaceted word—and then make some kind of empirical "real world" determination of whether a consensus had in fact been reached in negotiations among the interested parties. If this threshold was passed, the rule would be upheld. If not, the normal standard of review—the APA's arbitrary and capricious standard or another standard provided by the statute authorizing the agency to promulgate the rule at issue—would govern.

As a rookie/veteran (take your pick) of five and a half years of sitting on these cases, I have some comments and concerns about the proposed changes in the scope of review. Consider, for example, just exactly how judges would go about determining whether negotiated rules are within an agency's jurisdiction. So far as I can tell, courts would still have to ensure that the rule is within the agency's statutory perimeters and does not conflict with specific congressional intent. I do not think Harter is suggesting that the jurisdictional inquiry can be more summary than it is now. An appeals court still has an independent obligation to insure that the agency is not thwarting Congressional intent, regardless of how many parties agree with the agency's rule.

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[67] *Id.* at 103.

[68] *Id.* at 103. Harter writes that his present view is that *each* interest that is participating concurs in or at least does not oppose the result. (Letter, *supra* note 64). The Administrative Conference Recommendation provides "Consensus in this context means that each interest represented in the negotiating group concurs in the result, unless all members of the group agree at the outset on another definition." Procedures for Negotiating Proposed Regulations (Recommendation No. 82-4), 1 C.F.R. § 305.82-4 (1984).

The second leg of Harter's test—whether a true consensus existed—might be met simply by formal signatures to the negotiated proposal. On the other hand, it could in some cases require a close look at the process by which alleged consensus was reached in those, perhaps rare, cases where a post-negotiation dispute about "consensus" arose. This possibility, in turn, could mean that a careful record must be kept of the negotiation and that courts be allowed access to that record in cases of doubt.

It is vital as well to be clear on what standards an appellate court would use to determine whether a consensus has been reached. To those of us who are veterans of group politics the word consensus has a subjective overtone, *i.e.*, what will be accepted without contest. Unless it is objectively defined (*e.g.*, a vote of 100%, 51% or 2/3 of the participants; on all facets, on most facets, etc.), however, a mere requirement of consensus would invite different courts to evaluate similar negotiations quite differently.[69]

A problem might also arise with respect to whether the appropriate interests were represented in the consensus. This could come up by way of someone trying to appeal the rule who had not participated in the negotiations. Under prevailing law anyone who can show an adverse interest and, for some agencies, who participated in the notice and comment stage of rulemaking can appeal.[70] But Harter seems to suggest that under the new process a challenger might have to pass an additional test—*i.e.*, show that his "interest" had not been adequately represented in the negotiations and, if not, that he had himself tried to participate when the proposed negotiation was announced. I have trouble, however, seeing the justice or efficiency of a rule that requires every party potentially affected by a negotiation to either demand personal representation or take his chances on whether the designated interest group representative will truly represent his interests. This sort of standing rule might well encourage unnecessary challenges to the original committee if it became necessary to preserve an opportunity for later, substantive appeals.

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[69] *See generally* Harter, *supra* note 63, at 102-07. Harter points out that it is also important that the proposal contemplates that someone will make a relatively extensive effort to identify the interests and to contact suitable representatives with respect to the issues and their participation. In that sense, the process has a potential for wider participation than mere notice and comment. But in the case of consumers, for instance, it may be particularly difficult to secure one or even a few representatives to express the diversity of views and interests among that group. If that is the case, he says, negotiating regulations may be inappropriate for such a rule. But he also suggests that no more than fifteen interest groups should participate in a negotiation. In fact, one of his rules for a satisfactory process is that "The interests significantly affected by the subject matter of the regulation should be such that individuals can be selected who will represent those interests adequately." Harter, *The Political Legitimacy and Judicial Review of Consensual Rules*, 32 AM. U. L. REV. 471, 479 (1983).

[70] Section 10(a) of the APA, 5 U.S.C. § 702(a), generally provides that any "person aggrieved" by agency action has standing to seek judicial review of that action. Other statutes govern standing to seek judicial review of that actions of particular agencies. Under the Administrative Orders Review (Hobbs) Act, 28 U.S.C. §§ 2341-2352 (1982), for example, appellants must have been actual parties to agency proceedings, including notice

Furthermore, only a limited number of interest groups can take part in the negotiation of any regulation. Although Harter points to class action suits and unions as models of interest group representation,[71] neither analogy provides total comfort. A union representative is elected by its members and given statutory authority to represent those members' interests; no such process is at work in negotiated regulations. The class action analogy is somewhat more relevant, since in Rule 23(b) actions all class members are bound regardless of consent.[72] Yet the class representative must be certified by a court, and the class itself is bound only by a ruling, settlement, or dismissal that is judicially imposed or approved.

In sum, I am somewhat wary of the intrusion of the "interest" test into appellate standing. I worry about individuals being bound by "interest" group surrogates so as to preclude their challenging a rule on appeal when they can show they are adversely affected by the regulation and they participated in the notice and comment phase. At the same time, I do sympathize with Harter's concern that parties whose interests are obviously involved not sit out the negotiations and come forward only after the rule has been hammered out by others. Part of my difficulty, no doubt, is in conceptualizing an "interest" in this context. One may be a consumer or a small businessman but not agree with the compromise made by the consumer or small business advocate in

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and comment proceedings, in order to have standing to challenge the actions of six agencies including the Interstate Commerce Commission and the Nuclear Regulatory Commission. *See* 28 U.S.C. § 2344; Simmons v. ICC, 716 F.2d 40, 42-44 (D.C. Cir. 1983); Gage v. AEC, 479 F.2d 1214, 1218 (D.C. Cir. 1973).

[71] Harter, *supra* note 63, at 104 nn.558, 559 & 561.

[72] Fed. R. Civ. P. 23(b).

the negotiation. Even if an objection is made at the committee formation stage, how does the agency decide how many consumers or small businessmen to let in before negotiations even begin? In this sense, negotiatied rulemaking is quite different from a class action, where the complaint at least sets out the goal of the plaintiffs' representatives. Will the announcement of a regulatory committee tell "interest" group members anything about the substantive positions of their designated representatives? To overcome this hurdle, agencies could insist that committee members announce their goals and major positions in advance to discourage parties from claiming non-representation later. At a minimum, then, Congressional action would be necessary to convert our normal individual-oriented APA standing requirements into "interest"-oriented criteria.

Furthermore, I am not sure it is wise for courts, in determining standing under the proposed criteria, to get into questions of whether the challenger's particular "interest" was in fact represented or represented adequately, or whether a major issue was left out of the negotiations that concerned him. We now look only to see if he submitted comments and has made a plausible argument that he is adversely affected by the result.

Let me move now to what I consider to be the substantive core of Harter's judicial review schemata: that consensus is a surrogate for, or functional equivalent of the usual tests of reasonableness or nonarbitrariness that are used to measure compliance with APA standards of judicial review. Consensus among affected parties strongly suggests reasonableness in most situations, particularly if the court has already determined that there is no clear congressional intent on the subject. But courts will have to look beyond consensus, because it "ain't necessarily so" that consensus will serve as a substitute for reasonableness in all cases. The parties could have good reason to want a particular result even if it made little or no sense under a given statute; they could, in short, agree to a result that effectively took the place of a new statute or an amendment to an old one, but their agreed-upon rules might not be a reasonable product of the original statute. The consensus could also be pure political logrolling—I give you this and you give me that—rather than rational decisionmaking. I may be speaking more conceptually than practically, but certainly some inquiry into the reasonableness of a consensus rule will always be required, unless the APA is substantially changed.

And even if the negotiations over a proposed rule have reached a "true" consensus, the agency must surely still provide a convincing rationale and a sufficient factual basis for the final product that emerged from the negotiation. There is, of course, some precedent for reviewing negotiated actions differently. The results of collective bargaining conducted pursuant to the NLRA enjoy immunity from judicial review;[73] judicial review of arbitration awards is also very limited. [74] Judicial review of settlements in litigation has a standard all its own; but in the absence of a statutory charge, all agency rules—no matter how they are promulgated—are subject to the "arbitrary and capricious" standard. While consensus certainly may be an important factor in pursuing the meaning of that standard, it is doubtful that consensus can displace the traditional judicial gloss which has accumulated over the past forty years.

On balance, then, I am not at all sure that courts would become substantially less involved in negotiated regulations under Harter's judicial review standard. Inevitably, each phrase in the proposed new standard of judicial review opens up its own Pandora's box. This is not to deny the value of change, but it does indicate that blending the old with the new will take time and thought.

Harter's proposal for limiting judicial review of negotiated regulations has its roots in a theory of administrative law that rejects both the expertise[75] and non-delegation doctrines[76] as meaningful ways to govern the relationship between agencies and courts. This tradition views the regulatory process in essentially political terms and grounds the legitimacy of agency action, indeed of all government action, on the ability of the government to reconcile conflicting political and practical interests as expressed by interest group representatives.[77] Injecting the interest group conflict into the agency's decision-making process promises to make the government more responsive to the public interest. If agencies are required to take into account the views of all relevant groups—so the theory goes—their decisions will more closely resemble those made by the people themselves.[78] In such a theory, judicial oversight is both unnecessary and excessive.

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[73] National Labor Relations (Wagner) Act of 1935, 29 U.S.C. §§ 151-169 (1982); *see, e.g.*, NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 499 (1960); NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 404 (1952).

[74] *See e.g.*, United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596-98 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 (1960); International Union of Office and Professional Employees, Local 2 v. Washington Metropolitan Area Transit Auth., 724 F.2d 133, 137-39 (1983).

[75] *See, e.g.*, *Chevron*, 104 S. Ct. at 2793.

[76] *See, e.g.* Hampton v. United States, 276 U.S. 394, (1928); Estreicher, *supra* note 1, at 896-900.

[77] *See, e.g.*, R. DAHL, WHO GOVERNS (1961); D. TRUMAN, THE GOVERNMENTAL PROCESS (1951).

Harter's proposal—and the more general attempt to apply ADR to the entire regulatory process—represents the latest outgrowth of this pluralist approach to administrative law. By suggesting that affected parties play a direct role in the development of regulations from day one, it rejects the notion that regulatory dilemmas can be solved through technological rationality or enlightened expertise. By emphasizing the ills of the adversary system, this approach also rejects the hope that agencies can be directed by legislative will as determined by the courts. Perhaps most importantly, however, proponents of environmental ADR see in negotiated rulemaking the political legitimacy currently missing from the regulatory process. As Harter puts it:

> The classic way of establishing public confidence. . . is to have representatives of the people make the policy choices. Thus, an alternative, more direct way to make these inherently political decisions would be to adapt the legislative process itself to the development of regulations. Such a process would enable representatives of the competing interests, including the relevant agency itself, to thrash out a consensus on the policy instead of making a pitch to the umpire.[79]

Historically, however, the attempt to model the regulatory process on the political process has been troubled by three thorny problems. For any particular agency action, interest group pluralists have to determine which interest groups should be represented before the agency, what kind of participation is appropriate, and what sort of procedural rules will govern the ironing out of a consensus among those conflicting group interests.[80] These are essentially the same problems that linger in Harter's proposed standard for judicial review of negotiated regulations.[81] Under Harter's proposal, appellate courts might well be called upon to resolve any or all of these questions in reviewing a negotiated rulemaking: to develop legal standards for identifying relevant interest groups, and for assessing the extent of their participation and the "process" of negotiation. This could be a tall order for judges in many cases. Indeed, there is some question in my mind how much less complex and adversarial judicial review of the negotiating process would be than it is now under the current APA mixture of expertise and non-delegation theories.

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[78] For description and criticism of this "pluralist" view, see Frug, *Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1355-61, 1368-73. (1984); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1713-22. (1975).

[79] Harter, *supra* note 63, at 27-28.

[80] *See* Frug, *supra* note 78, at 1368-73.

[81] Harter writes that in some negotiations the participants have agreed that interests would not formally ratify any agreement but rather would engage in an informal agree-

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In closing, I want to note a fact of which ADR proponents are well aware: that the push for settlements is not a universally applauded one. In a provocative article, Owen Fiss argues that settlements are not generally preferable to full-scale litigation, and should not be institutionalized on any wholesale or indiscriminate basis.[114] Analogizing the settlement to plea bargaining, he finds it a "highly problematical technique for streamlining dockets" and a capitulation of the ideal of justice to the demands of a mass society[115] Fiss' objections to settlements are threefold: consent is too often coerced by imbalances in the bargaining strength of the parties; the bargain may be struck by someone without the authority of a judge; and the absence of any trial or judgment renders subsequent judicial involvement troublesome.[116] Fiss worries about limits on the power of judges, as well as their desire to enforce complex, controversial and expensive decrees when the going gets rough; and he cites some experiences to prove his point.[117] Fiss places great emphasis on the courts as "value articulators." On a philosophical plane, he believes that settlements reduce the social function of a lawsuit to one of resolving private disputes, rather than one of declaring public values.[118]

I am not against settlements. They have always been and will continue to be the only way the system can work, particularly in making room for those cases which must be litigated to the end. But the amputation of meaningful judicial review from settlements or negotiated regulations in the environmental field would make these ADR techniques far less attractive to some of the parties as instruments of justice. And if settlements are to embody the nearest approximation of the ideals of justice to which Fiss gives expression (and which he assumes emerge from litigation, though I am not so sure), we must exercise restraint and forethought about what they contain and how we want judges to treat them.

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[114] Fiss, *Against Settlement*, 93 YALE L.J. at 1073 (1984).

[115] *Id.* at 1075.

[116] *Id.* at 1076-85.

[117] *Id.* at 1084.

[118] *Id.* at 1085.

# The Role of Courts In Regulatory Negotiation—A Response to Judge Wald

by Philip J. Harter*

"Alternative means of dispute resolution" have clearly become an important topic of discussion and practice.[1] The debate recognizes that courts currently play, and will continue to play, a major role in resolving society's disagreements. Moreover, courts establish the context that gives shape and life to the alternatives. The current consideration of "ADR" argues that other means may be more appropriate depending on the issues, the parties, the press of time and money, the state of precedent, and the relationship among the parties.[2] The scope of alternative dispute resolution has ranged from major, multi-million dollar corporate matters to pesky neighborhood disturbances that cause friction but are unlikely to end up in court short of the violence that may result precisely because they go unresolved.

Not surprisingly, one of the ways in which various means of dispute resolution—particularly direct negotiations among the affected interests aided by a neutral mediator—have been used is to

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[1] The use of alternative means of dispute resolution has become sufficiently significant to have spawned a large literature. The following, for example, are *bibliographies* of writing in the field: G. Bingham, B. Vaughn & W. Gleason, Environmental Conflict Resolution (1981); U.S. Department of Justice, Federal Justice Research Program, Dispute Resolution: Techniques and Applications (1985); F. Sander, Mediation: A Select Annotated Bibliography (1984).

[2] As the opening paragraph of a report prepared by an Ad Hoc Panel on Dispute Resolution and Public Policy consisting of senior, nationally prominent individuals representing diverse perspectives says:

> Society cannot and should not rely exclusively on the courts for the resolution of disputes. Other mechanisms may be superior in a variety of controversies. They may be less expensive, faster, less intimidating, more sensitive to disputants' concerns, and more responsive to underlying problems. They may dispense better justice, result in less alienation, produce a feeling that a dispute was actually heard, and fulfill a need to retain control by not handing a dispute over to lawyers, judges, and the intricacies of the legal process.

U.S. Department of Justice and the National Institute for Dispute Resolution, Paths to Justice: Major Public Policy Issues of Dispute Resolution 1 (1984).

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resolve disputes over environmental questions.[3] The issues involved include complicated and controversial questions of industrial siting and use, planning of control and cleanup measures, allocation of resources, and environmental quality.[4] It has also been proposed, if not yet used fully, for cleaning up Superfund sites.[5]

Most environmental disputes are highly complex, involve significant technical questions of risk assessment and its management, are based on or establish issues of public policy, and affect many parties. As a result, they have all the earmarks of a typical rulemaking proceeding. It is, therefore, a relatively short step from the successful use of ADR in environmental matters to their application in developing regulations, albeit the techniques would need to be adapted to the peculiarities of the regulatory process. To that end, the Administrative Conference of the United States commissioned a study of the use of direct negotiations among the parties in interest in developing regulations,[6] them study formally recommended procedures for doing so.[7] Several agencies have used the process, and several more are well along in planning to use it for new regulations.

The Federal Aviation Administration used ADR to revise its rules governing the amount of time a pilot can fly without taking a rest and the minimum periods between duty assignments.[8] The original rule had proved enormously controversial, and the FAA had tried unsuccessfully several times before to update it. Its complexity had generated more than 1,000 pages of interpretation. Significantly, especially given its history, once the rule was issued,[9] it was not challenged judicially. The Environmental Protection Agency used regulatory negotiation to develop two rules, one involving the nature of penalties imposed for truck engines that fail to comply with the dictates of the Clean Air Act[10] and the other to establish the procedures for granting emergency exemptions from pesticide registration requirements.[11] As with the FAA, the comments submitted in response to the Notices of Proposed Rulemaking were remarkably sparse, and no judicial challenge has been filed against either rule. The Occupational Safety and Health Administration used a variant of the process to address the occupational exposure of benzene. That rulemaking had extended for nearly ten years and had reached the Supreme Court,[12] and thus had become a particularly difficult regulatory proceeding by the time the negotiations began. The discussions involved four industries and four unions. The parties made significant headway in developing a consensus, but for complex reasons largely beyond the negotiations themselves no final agreement was reached. Nonetheless, the participants viewed the process as worthwhile since it elucidated the needs and concerns of the other parties.[13] That they made it that far in that rulemaking demonstrates the potential of the process.

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[3] G. Bingham, Resolving Environmental Disputes: A Decade of Experience (Conservation Foundation, forthcoming); A. Talbot, Settling Things (1983); L. Bacow & M. Wheeler, Environmental Dispute Resolution (1984); L. Susskind, L. Bacow & M. Wheeler, Resolving Environmental Regulatory Disputes (1983); Cormick, *The "Theory" and Practice of Environmental Mediation*, 2 Envtl. Prof. 24 (1980).

[4] *See generally* Bingham, *supra* note 3.

[5] Anderson, *Negotiation and Informal Agency Action: The Case of Superfund*, 1985 Duke L.J. 261 (1985).

[6] The report was published as Harter, *Negotiating Regulations: A Cure for Malaise*, 71 Geo. L.J. 1 (1982).

[7] Recommendation 82-4, 47 Fed. Reg. 30,701 (1982) (to be codified at 14 C.F.R. § 305.82-4).

[8] Eisner, *Regulatory Negotiation: A Real World Experience*, 31 Fed. B.J. 371 (1984).

[9] 50 Fed. Reg. 29,306 (1985) (to be codified at 14 C.F.R. § 121, 135).

One of the major questions facing ADR in general,[14] and regulatory negotiation in particular, is the relationship of the decisions reached in the alternative forum to the courts. Just as the courts and administrative agencies had to struggle—and are still struggling—to reach an accommodation, the various forms of ADR and the courts will likewise have to develop some sort of allocation of responsibilities. Because courts play such a large role in supervising or overseeing the regulatory process—surely that is a more accurate description than the term "partnership" sometimes employed by the courts[15]— the need to establish that relationship is particularly important for regulatory negotiation since it can have such a strong bearing on what happens before the agency itself.

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[10] 50 Fed. Reg. 35,374 (1985) (to be codified at 40 C.F.R. § 86).

[11] 50 Fed. Reg. 13,944 (1985) (to be codified at 40 C.F.R. § 166).

[12] Indus. Union Dep't. v. Am. Petroleum Inst., 448 U.S. 607 (1980).

[13] H. PERRITT, ANALYSIS OF FOUR NEGOTIATED RULEMAKING EFFORTS (1985) (a report to the Administrative Conference of the United States).

Moreover, in considering the "success" or "failure" of the negotiations, it is important to note that OSHA missed its own deadline for issuing an NPRM on the standard by more than two years. One cannot divorce negotiations from the broader context in which they operate.

[14] The issues involve such questions as whether parties must incur extra costs, sometimes including attorneys' fees, if they "appeal" an arbitrator's decision to a court without substantially improving their position; whether the discussions during mediation may be held confidential (*see, e.g.*, AMERICAN BAR ASSOCIATION, SPECIAL COMMITTEE ON DISPUTE RESOLUTION, CONFIDENTIALITY IN MEDIATION (1985)); what is the appropriate use of masters to help settle complicated cases (*see, e.g.*, 8 LEGAL TIMES 2 (October 14, 1985)); indeed, whether it is appropriate to encourage settlements at all (Schoenbrod, *Limits and Dangers of Environmental Mediation: A Review Essay*, 58 N.Y.U. L. REV. 1453 (1983); Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984)).

Parties are interested in negotiating a regulation, as opposed to relying on a more adversarial mode, and hybrid rulemaking is surely that, because it allows them to share in making the actual decision and to help develop a better, more informed rule. They would not incur the time, expense, and anguish of making hard choices, however, if their work were to be easily undone. Inappropriate forms of judicial review could do just that. On the other hand, judicial review can also play a vitally important role not only for ensuring the integrity of the process but also for providing positive incentives to make the rulemaking process work well.

Undoubtedly the best approach to judicial review would be to obviate its need because everyone has been sufficiently satisfied with what happened before the agency. This has been our experience so far with *all* of the rules developed by this process. But, alas, that surely will not continue forever. As Judge Patricia M. Wald points out in her article, *Negotiation of Environmental Disputes: A New Role for the Courts?*,[16] "negotiation typically does not eliminate court involvement altogether; instead it changes the nature and scope of the judicial role."[17]

While the full nature and scope of judicial review of negotiated regulations will have to evolve over time, the process can be aided by an analysis of the points likely to be raised. As in good negotiations, the needs of both the agencies and the courts, while implementing their respective duties, can be examined and an accommodation sought. A dialogue before the fact can help clarify the issues and lead to a fuller understanding on everyone's part. To that end, Judge Wald's analysis of the judicial oversight of negotiated regulations is significantly helpful. Since much of her analysis was in response to my earlier writing, I appreciate the opportunity to join the debate in response; indeed, it was in large measure her suggestion that I do so.

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[15] Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 554 (1974). *But cf.* Judge Bazelon's opinion in Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971).

[16] Wald, *Negotiation of Environmental Disputes: A New Role for the Courts?*, 10 COLUM. J. ENVTL. L. 1 (1985).

[17] *Id.* at 17.

## OVERVIEW OF THE REGULATORY NEGOTIATION PROCESS

While each regulatory negotiation, like any other rulemaking, is likely to be a little different from any other, the process as contemplated by the ACUS recommendations has several critical characteristics that will bear heavily on judicial review and the legitimacy of the entire process. As a setting for the analysis of judicial review, an understanding of the process is essential; hence, it is briefly described here.[18]

Once the agency, either on its own initiative or in response to a request by an interested party,[19] decides that it *may* be appropriate to use regulatory negotiation to develop a proposed rule, it would appoint a neutral convenor to conduct a feasibility analysis.[20] The convenor would identify those interests that would be significantly affected by the regulation and the issues that need to be addressed by the rule, and in any negotiations, should they be undertaken. The convenor typically does this by starting with the agency and asking it both who would be affected and what issues are important. He or she would then go to the people named by the agency and ask them the same questions. That effort, coupled with independent research, will usually uncover at least the major players and issues.

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[18] For a more complete description of the process, see recommendation 82-4 of the Administrative Conference of the United States, 1 C.F.R. § 305.82-4 (1985); Harter, *supra* note 6; Harter, *The Political Legitimacy and Judicial Review of Consensual Rules*, 32 AM. U.L. REV. 471 (1983); and Eisner, *supra* note 8.

[19] In at least one instance, the agency was initially hesitant to use regulatory negotiation to develop its rule, but a couple of its constituents who were usually on opposite sides of issues persuaded it to explore its feasibility. The agency did so and decided to go forward with the process.

[20] As will be described later in the text, the convenor has two significant roles: one is to identify the parties that will be significantly affected by the rule and who should participate in the negotiations if they are held. The second is to help those parties analyze whether it is in their interest to use direct negotiations for developing the proposed rule or whether some other process would benefit them more. In both cases, it is helpful to have someone who is neutral with respect to the subject matter of the rule and to any party. Otherwise the convenor's bias could influence analysis concerning whether a party should be included. Moreover, it could interfere with his or her working with a party in exploring what the negotiation process would likely entail, since a party may be reluctant to share concerns or viewpoints if it thought they might be repeated or used inappropriately.

The convenor must also assess whether the parties believe it is in their overall best interest to attempt to negotiate a proposed rule or to rely on the normal process. Factors likely to influence that decision are:

—whether the issues are mature and ripe for decision; it is difficult to negotiate a solution to a problem that is only dimly understood or that can be put off until another day.
—whether there is a reasonable deadline for the negotiations; reaching agreement is a tough task since parties must make hard choices; hence, a deadline is decidedly helpful;[21] this can usually be provided by the agency's committing itself to developing the rule through the traditional process should the negotiations prove unsuccessful after a specified period.
—whether the outcome of the proceeding is genuinely in doubt; various parties may each have enough power—clout in one form or another—so that no one party, including the agency, can totally dominate what happens.[22]
—whether any interest would have to compromise an issue that goes to the very core of its existence; no one compromises issues like that.
—whether there are a diverse number of issues that are likely to be of different value to different interests.[23]
—whether there are a limited number, roughly no more than 15-25, of distinct interests that would be substantially affected, and whether they are such that individuals can be selected to represent them.[24]

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[21] John Dunlop, one of the country's true experts on negotiation, points out that labor contracts are typically settled late in the night of the deadline precisely because it would be politically imprudent for any negotiator to return to the constituency well before the bewitching hour claiming that they got all that was possible; the difficult choices come at the end when you must decide among priorities and make the ultimate decision—are you better off with the deal or with the alternative to the agreement. Dunlop, *The Negotiations Alternative in Dispute Resolution*, 29 VILL. L. REV. 1421, 1436-1437 (1984).

[22] It sometimes comes as a surprise that agencies often lack the ability to issue a rule at will. But, as the FAA example shows, agencies too are buffeted politically and other parties are able to derail a regulatory effort they oppose. One should not confuse the agency's *authority* to issue a regulation with its *power* to do so. Harter, *Dispute Resolution and Administrative Law: The History, Needs, and Future of a Complex Relationship*, 29 VILL. L. REV. 1393, 1418-1419 (1984).

[23] While the "differential value" placed on different issues sounds exotic, it is not. Indeed, it is the most trivial of requirements. For example, the sale of a simple item results from the customer valuing the product more than the money reflected in its price, whereas the store owner has reverse preferences. The point is, one is not likely to negotiate anything unless there is some opportunity for a trade which makes the person better off from his or her perspective.

[24] It is, of course, true that even the most dedicated convenor will not be able to identify, let alone talk to, *all* interested parties. His aim is to pick up those that would likely participate in a typical rulemaking, plus sufficient others so there is a significant likelihood

If, after that analysis, it appears that regulatory negotiation would be appropriate, the convenor would recommend it to the agency. If the agency decides to go forward, it would appoint a senior agency official—generally the one charged with developing a draft rule within the agency—to be its representative to the negotiations.[25] A neutral mediator, who is responsible for aiding the *process* of the negotiations, is usually helpful for any complex or controversial rule. Generally the person who served as the convenor will fill that role since he or she has developed an understanding of the issues and a rapport with the parties. The mediator has no power whatever to decide issues or impose a decision; his or her role is one of helping the negotiators themselves reach an agreement by helping to define the issues, generating creative options, carrying messages back and forth, being an "agent of reality" to each party, making it "safe" for the parties to talk directly, as well as facilitating the plenary discussions.

The purpose of the negotiating committee is to develop a "consensus" on a proposed rule.[26] It is surely preferable if the consensus extends to the actual language of the important provisions of the rule and its supporting preamble, since many policy choices surface in the drafting. "Consensus", as Judge Wald notes, can

that the relevant issues will be raised and resolved during the negotiations. Thus, for example, it would be impossible to have the desires of all "consumers" fully represented, but relatively straightforward to have individuals who advocate the major consumer interests, such as safety or low cost or diversity, participate.

It may be that there would be too many such parties to negotiate successfully. In that case, the parties may be interested in forming caucuses for purposes of participation, with a designated individual representing that interest along with "elbow advisors" to provide particular vantage points. Some interests may choose not to participate but to be kept informed of the proceeding; usually, the best way to do that is for someone, generally the mediator if there is one, to ensure that the party most closely allied does keep that interest abreast of developments.

[25] It may not be essential for the agency to participate directly in the negotiations, but it surely must have some intimate relationship to them if it is to be able to use the resulting agreement. If the agency fails to have such a connection it is highly likely that the agency will find one reason or another to disown the results.

[26] It may be, of course, that the group is unable to reach a consensus on a rule but can agree on the basic provisions of one. The give and take of discussions may illuminate what the various parties "can live with." The group may then turn the issue over to the agency to "arbitrate" their differences by developing a rule within the region of acceptability. The FAA negotiations followed this route. On the other hand, the parties may feel that the provisions of a standard are so intertwined that it must be regarded as a whole rather than a collection of freestanding parts. In that case, the failure to agree would mean the group would report that fact and nothing more to the agency. All bets would then be off with respect to all parts of the regulation: no one would be "bound" in any way to anything said or done during the negotiations. The benzene negotiations adopted this approach.

be a difficult term to define in the abstract[27] and a difficult status for a reviewing court to discern, whatever the definition. The parties can choose to define it however they see fit,[28] but its definition can have a significant bearing on the willingness of parties to participate and perhaps on any subsequent judicial review. Unless the parties agree otherwise, the definition that has proved the most workable is that "consensus" means that each *interest* represented in the negotiations concurs in—or at least does not oppose—the result.[29]

That definition has several important consequences. First, no party can be outvoted; hence, each preserves whatever power it has. This has proved critical to most parties' willingness to participate in regulatory negotiations. Second, it forces the parties to come together to solve a mutual problem—developing the rule. They can no longer act as a group of disparate interests, each of which can dissent from a provision, go back home, and tell their constituents how tough they were. Rather, all participants must decide whether, on the whole, they are better off accepting the agreement or trusting their fate to another process. Third, it means that individual members of an interest group may dissent without destroying the consensus, so long as the interest as a whole concurs.

The agency agrees to use the consensus proposal as the notice of proposed rulemaking unless it is outside the agency's authority or something is significantly wrong with it. That should happen rarely, however, since presumably the senior agency official has signed off on it, and he or she should have done his or her homework to ensure that no other relevant agency officials had problems with the proposal as it was developing and before its adoption.

Following the convenor's analysis, the agency would begin the actual process by publishing a notice in the *Federal Register*[30] and in substantive publications read by mere mortals who may be interested in the subject matter. The announcement would indicate the agency is intending to establish an advisory committee pursuant to the Federal Advisory Committee Act for purposes of negotiating the rule. It would describe the issues likely to be raised and the parties that had been identified by the convenor as being interested in participating. In that way, others can determine whether they would be affected and whether they should participate, or whether their interests are already adequately represented.

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[27] Wald, *supra* note 16, at 20.

[28] The "Organizational Protocols" that were adopted by EPA's Committee for standards for worker protection from agricultural pesticides appear at the end of this article as an appendix. It provides the framework for the Committee's operations.

[29] *See* Harter, *supra* note 6, at 92-97.

[30] *See, e.g.*, 50 Fed. Reg. 38,030 (1985).

If new parties do come forward, the convenor and the agency must decide whether to include them. Because the purpose of the negotiations is to ensure that the relevant issues get raised and resolved, it is far better to err on the side of inclusion. Thus, they should be included unless doing so would result in too many parties and it is not likely that a party seeking admission would raise significant new issues. Even in that case, it may be appropriate to form caucuses of allied interest for purposes of participation.[31] Even if a party does not join the committee, it can express its views during the committee's meetings or in response to the resulting Notice of Proposed Rulemaking. Thus, no one is shut out.

The group needs to decide what information is required to make a responsible decision. One of the major values of this process is that the parties bring with them, or can otherwise obtain, insight and perspectives for developing a workable solution to the regulatory question. In addition, the negotiating group will typically be furnished with technical information developed by the agency.[32] The Environmental Protection Agency has also established a "Resource Pool" the committee can draw on for purposes of the negotiations, such as for conducting short-term research or analysis.[33]

The groups operate under the Federal Advisory Committee Act which requires open meetings, although private caucuses can be held.[34] Most experts on negotiating emphasize the need for closed sessions to encourage candid exchanges. The "sunshine" of the meetings has perhaps made things a bit more difficult at times but not impossibly so, and closing meetings in which public policy decisions are being made has a cost of its own. Therefore, very little effort has been made to close any meeting.

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[31] *See supra* note 24.

[32] *See, e.g.*, 50 Fed. Reg. 42,789 (1985) (OSHA announced its intention to form a negotiating committee and its plans to furnish it with the relevant information).

[33] *See, e.g.*, 50 Fed. Reg. 38,030 (1985) (announcing EPA's intent to form a committee to negotiate its standards for protecting farm workers from agricultural pesticides and which describes the Resource Pool).

[34] Nat'l Anti-Hunger Coalition v. Executive Comm. of the President's Private Sector Survey on Cost Control, 711 F.2d 1071 (D.C. Cir. 1983).

If the group is able to reach a consensus, it submits it to the agency as a recommendation for a Notice of Proposed Rulemaking (NPRM). The protocols developed for three negotiations have explicitly required each participant to sign the consensus and to ensure that that person has the authority to do so.[35] In other instances, the approval has been more informal.

The agreement has meant that the representative concurs in it, but it does not purport to bind all members of that representative's constituency. Thus, for example, an individual member of the interest group—be it a trade association, a labor union, or an environmental organization—who is dissatisfied could file comments with the agency in response to the NPRM or challenge the rule in court. Indeed, the interest as a whole would even disown the earlier agreement and file adverse comments or challenge it judicially. As a practical matter, however, that should rarely happen: if one party disaffects, others will too. Since it is likely that the outcome of the rule was genuinely in doubt when the process began, it probably still is. In that case, trashing the agreement will result in the loss of something that is known in return for a situation where the party could lose even more. Thus, a more desirable condition from everyone's perspective would be for the individual dissidents to challenge while the interest as a whole signals the decisionmaker—be it the agency, OMB, or a court—that it backs the agreement. In that way, the challenger can attempt to show that it would be affected differently than others or that its concerns were not raised. That will serve as an important check on those who do participate not to ignore the full range of interests. But, if the others lend their support, the decisionmaker will also know that the challenger does not speak more broadly. That in turn will help illuminate whether the challenger has real needs or whether it simply seeks more than it got at the table.

## THE NEEDS OF REVIEW

Sloughing off a course full of detail,[36] the Administrative Procedure Act (APA) provides that a reviewing court is to "decide all relevant questions of law" and "hold unlawful. . .agency action. . .found to be. . .arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[37] Thus, as explicated by *Overton Park*,[38] which, although not involving the review of rulemaking, has become the foundation of the nature and scope of the judicial review of regulations, a court is to undertake a two step process:

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[35] *See, e.g.*, Paragraph III of the Appendix.

[36] *See* Levin, *Federal Scope-of-Reviews Standards: A Preliminary Restatement*, 37 AD. L. REV. 95, 104-110 (1985).

> The court is first required to decide whether the [agency] acted within the scope of [its] authority. . . . This determination naturally begins with a delineation of the scope of the [agency's] authority and discretion. . . . Also involved in this initial inquiry is a determination of whether on the facts the [agency's] decision can reasonably be said to be within that range.
>
> Scrutiny of the facts does not end, however, with the determination that the [agency] has acted within the scope of [its] statutory authority. Section 706(2)(A) requires a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." . . . To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.[39]

*Scope of Authority.*

Everyone involved in negotiating a regulation must recognize on a fundamental level that the proposal must be within the agency's authority granted by statute if the agency is to use it as the basis for a rule. That is simply a recognition that neither the agency nor certainly the negotiating group is sovereign. Rather, the agency must act within the bounds of discretion provided by Congress if its actions are to be a binding, official position. Thus, just as in the judicial review of a rule developed by another process, the court's first task must be to determine whether the rule is within the scope of the agency's authority. That process would be very much as it is customarily. Not only is this step required by the APA, it also serves several practical functions with respect to negotiating regulations.

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[37] 5 U.S.C. § 706(2)(A) (1982).

[38] Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

[39] 401 U.S. 415-416.

First, the statute, along with any implementing gloss placed on it by the agency and the courts, is the norm against which the negotiations are conducted. As in any negotiation, a party should keep its eye on what it could obtain without an agreement, and it should make a bargain only if it will be better off for doing so. In Fisher and Ury's popular term, the party needs to continually assess its "best alternative to a negotiated agreement" or BATNA.[40] The agency's scope of authority defines the contours of the parties' BATNA in regulatory negotiation. It is important for that reason alone for the courts to enforce that expectation. Were it otherwise, one party could pressure another into giving up something it won legislatively although that party had gained a reasonable expectation of achieving that result.[41]

Second, judicial enforcement of the limitations on an agency's authority also provides a deterrent against that ever present villain of democratic politics—logrolling. Were it not for judicial oversight, it would surely not be inconceivable for the negotiating parties to make impermissible "deals" that are outside Congress's contemplation.[42] A strikingly clear example of that—which has *not* arisen—would be if the parties to a negotiation over an occupational health standard agreed to a lower level of protection in return for an increase in wages for exposed employees. While that agreement may or may not make sense outside the OSHA context, and both sides have been argued strongly, the theory and nature of OSHA regulation is precisely contrary to such trade-offs. Thus, the judicial role here is to prevent impermissible deals or logrolling by requiring that the resulting rule be within the agency's scope of authority.

Third, the judicial role also prevents sell-outs in which a party agrees to something short of what it should obtain under the governing law. Perhaps the greatest concern here would be in the agency's hasty acceptance of a negotiated deal in return for some other, intangible benefit.[43]

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[40] R. FISHER & W. URY, GETTING TO YES 101 (1981).

[41] To be sure, a party may still suffer some other sanction such as the inability to achieve the regulation in a timely fashion. That is, whereas one party may have an expectation of a particular type of decision, another party may have the power to delay it or to condition it on other provisions. Thus, the first party's BATNA may be a moderate regulation in a timely fashion, no regulation at all, or a stringent one after a protracted fight, all depending on how the pieces are reconciled.

[42] Judge Wald raised this spectre. *See* Wald, *supra* note 16, at 22.

Thus, the judicial role in defining the scope of the agency's authority not only serves its usual role, but also provides additional incentives for the parties. While this role is an important and necessary one, the courts should be decidedly circumspect in exercising this duty too aggressively. The court should, of course, be on the alert for logrolling and the like, but, that aside, it should be reluctant to second-guess a diverse group of interests—representing a wide spectrum of concerns[44]—that has concurred in the outcome, and whose individual members feel that on the whole the rule meets their needs.

The process itself helps ensure that the proposal is within the agency's authority: if the agreement does not reflect a major provision of the statute or is otherwise outside the agency's authority, presumably some party would be better off if it did and that party would likely insist on compliance. While that may sound a bit utopian, it is a measure of the extent to which the agreement is out of conformance with the statute. It may be that a bit of play is needed in the joints of a statute. The parties are typically better able to determine "what works" within the theory of the statute and hence what is the best way of achieving its overall goal. Or, a provision may be included in a statute to benefit a particular interest. If that interest does not insist on its full exercise as part of the agreement, the rule should still be accepted without that interest's being estopped from insisting upon the full application of the provision in future rulemakings. That they agreed indicates the interest achieved the protection sought in the statute[45] which would otherwise come through a rigorous application of "scope of authority" review.

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[43] Although not in the regulatory negotiation context, the controversy over "sweetheart" deals with respect to Superfund cleanups would be a prime example. Note, however, that "sell-outs" should not occur if in fact all the major parties are at the table and concur. Surely neither the local municipalities nor environmentalists would have concurred on those Superfund deals if they were indeed tainted. The process itself, therefore, is constructed to address the issue. That a court will review for scope-of-authority is thus an incentive to ensure that the proper parties are included.

[44] *See supra* note 24 and accompanying text.

[45] Such an issue arose in the benzene negotiations when corporate interests would have preferred to waive a provision that was intended to protect them. *See* Perritt, *supra* note 13.

Thus, the court needs to define the authority of the agency but provide a little leeway to accommodate practical interpretations and implementation.

*Arbitrary and Capricious.*

The Supreme Court directed the reviewing courts to make a "searching and careful" inquiry into the facts and to decide whether the decision is based on a consideration of the relevant factors.[46] More recently, Judge Leventhal's characterization of the judicial process has become the frequently used shorthand. As Judge Wald began her article by pointing out, Leventhal advocated—and as a reviewing judge required—that "the agency. . .take[] a 'hard look' at the salient problems and engage[] in reasoned decision-making; the decision itself must come 'within a zone of reasonableness.' "[47] Whichever term is used, the court is expected to carefully review the factual basis on which the agency based its decision and to carefully analyze whether the agency considered the relevant factors (or relied on an impermissible factor) and ultimately reached a decision within the zone of reasonableness under the statute.

It should be recognized, however, that in developing this standard of review, the courts adapted a more deferential, less intrusive oversight to meet the needs of the times.[48] The former standard was simply not up to corralling agency action in the face of complex technical and social science questions or the pervasive influence of regulation. The courts responded with a new form of review by changing the interpretation placed on twenty-five year old statutory commands. This adaptation provides important incentives to agencies to do a thorough job in developing the underlying facts and to exercise their discretion with care. It therefore serves as a powerful check against the arbitrary use of administrative power.

In the same vein, it may be appropriate for courts to alter their means of ensuring that agency action is not arbitrary or capricious if the rule is the product of regulatory negotiation. Thus, the destination of *Overton Park* would remain the same, but the route taken in getting there can and should be changed. That is not because the standard should be any lower, but because the nature of review developed to supervise one process may inhibit the use of another that has other means of achieving the same end. Judicial review should therefore be tailored to ensure that those means are fulfilled.

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[46] Citizens to Preserve Overton Park v. Volpe, 401 U.S. at 416 (1971).

[47] Wald, *supra* note 16, at 2.

[48] DeLong, *Informal Rulemaking and Integration of Law and Policy*, 6 VA. L. REV. 257, 286 (1979).

Without supervision, the agency may not have adequate incentives to delve into the relevant factors—statutory, factual, or political—that are involved in a rule. The "hard look" form of judicial oversight addresses that lack by providing the stimulus of the pain of reversal unless the agency does its homework. *But*, the directly affected parties are in a far better position than the agency or a reviewing court to determine what the "relevant factors" are and the weight to be accorded each; they can determine how much information is needed to resolve the outstanding factual issues; they are in the best position to determine the appropriate political trade-offs—all within the context of the agency's authority.[49] And again, if there were a "relevant factor" that would affect the outcome of a rule, it would be in the interest of some party to raise it for discussion and insist that it be adequately considered lest a consensus fail. That the rule reflects a consensus of the affected parties therefore goes a long way towards meeting the goals of *Overton Park* and ensures that the rule is neither arbitrary nor capricious.

The issue then becomes whether the rule does indeed reflect that consensus. The very fact that we are discussing judicial review posits that at least someone is unhappy with it and hence that it does not reflect unanimity, which is, after all, one definition of consensus. What, therefore, is the court to do?

The issue in contest may, of course, have been addressed directly in the preamble to the rule so that the review would be much the same as in a typical rulemaking. This emphasizes that a negotiated rule will still have a preamble that explains the basis and purpose of the rule and the reasons the various choices were made as they were.

If the issue is not explicitly developed, the court could still satisfy itself in large part by a procedural review of the process. The question is whether the parties to the consensus reflect sufficiently diverse perspectives that the full range of issues would be raised in the negotiations.

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[49] That said, it is highly unlikely that a rule produced through regulatory negotiation will be at an extreme of the agency's authority. Rather, its emphasis is more likely to be on finding practical solutions that accommodate the various interests' needs, and that will rarely be on the boundary. Thus, if it is important for an interest to press all the way, this process is probably not an appropriate vehicle.

A beginning point would be to examine the process by which the negotiating committee was established. That would surely entail an examination of the issues raised in the Notice of Intent and its list of interests that would be represented on the committee. Thus, the court would determine whether the notice was sufficient to alert an interest as to whether it might be affected and whether someone with allied needs would be present so it could be relatively comfortable that its issues of concern would be raised.

Indeed, one of the major advantages of negotiated rulemaking is that by means of the convening process and the notice of intent, a concerted effort is made to identify the affected parties and to encourage them to participate directly in the development of a rule. Regulatory negotiation is therefore likely to result in broader participation than the traditional process. Thus, more issues are likely to be confronted.

To ensure that a party's concerns are considered by the negotiating committee in the first instance, or by the agency in response to comments filed on the NPRM,[50] the court should not reward a party for sitting out the process and challenging only the final rule. Therefore, if the notice and the preliminary outreach[51] are sufficient to alert those likely to be affected, it would be appropriate for the court to provide an incentive to come forward and participate directly in the discussions by requiring a reasonable explanation of why the challenger believes its interests—those relevant factors—may not have been raised and its failure to come forward. Thus, the court should require a reasonable explanation as to why the petitioner did not "exhaust its administrative remedies"[52] by participating before the agency.

Parts of an earlier article have been construed as my arguing that a party should be "bound" by an agreement so long as its interest was represented at the table.[53] After having seen these things in action and after reflecting on Judge Wald's article, I am prepared to confess error on that score. "Interests" are too slippery for that, and determining just how far a consensus goes can be as elusive as the term itself.[54] It now seems to me that a failure to provide an adequate explanation should not be regarded as a fatal preclusion of review, but the petitioner should be put to a relatively higher burden of knocking down the agreement that others forged. That is certainly close, if not identical, to current standards.

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[50] The agency would likely seek the views of the negotiating committee on the comments so that it could take them into account when writing the final preamble and revising the rule to reflect meritorious comments.

[51] It may be appropriate for an agency to include a list of the parties that were contacted by the convenor, along with a brief description of their respective interests, in the record of a negotiated rule. That would aid the court in determining whether any interest was excluded from the discussions that would be affected by the rule.

[52] *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978), requires that a party challenging a rule must raise the issue first before the agency.

If such an explanation is provided, the court must still determine whether the decision is within the "zone of reasonableness" or whether it reflects an adequate consideration of the "relevant factors." In determining whether the important factors were considered and resolved appropriately, the court would want to look at the range of interests that were represented and that concurred in the result by signing the document. [55] The petitioner should be required to make some showing that *its* specific interest was somehow not dealt with adequately, and hence that a relevant factor was not considered, or that the result was a clear error of collective judgment.

Knowing that a single member of a broader constituency is challenging a rule should help the court focus on the precise issue in controversy. Either the petitioner feels it would be affected differently than the others in its constituency, or it disagrees with the balance that was struck. If the petitioner was affected differently than the others at the table, then the court must decide whether, all things considered, the decision is still within that zone of reasonableness. That decision would turn on the interplay of those interests that were present and the explanation of the decision in the preamble. If, on the other hand, the challenger's interest was represented, so that it is disagreeing with the resolution of the issues, the court should recognize that negotiated rulemaking is like legislation—a method for reaching a political accommodation[56]—and reject the challenge.

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[53] Wald, *supra* note 16, at 20-22 (construing Harter, *supra* note 6, at 102-107).

[54] A frequent criticism of courts is that they lack "feel" of a problem and hence set out requirements that are not practical. It is therefore altogether fitting and proper for a judge to point out the inpracticalities of just how a court might go about implementing the interest representation model. Such is the difficulty of writing about something never experienced.

[55] If the process were more informal, the court would clearly have less assurance of a "consensus" and hence need some independent evidence of it if the court were to grant any deference to the rule as the product of consensus. That could in part by provided by the support shown for the rule by those who did participate.

*The Thorny Problems.*

In concluding her analysis of the judicial review of negotiated rules, Judge Wald emphasizes three thorny problems:

> For any particular agency action, interest group pluralists have to determine which interest groups should be represented before the agency, what kind of participation is appropriate, and what sort of procedural rules will govern the ironing out of a consensus among those conflicting group interests.[57]

These are surely the major issues, plus perhaps a fourth: how much information should the group be required to develop in reaching a decision. The hybrid process thrives on paper, for the quite legitimate and important reason that it is a means of controlling discretion that is needed precisely because parties do not participate directly. But, much of the analysis of the hybrid procedure is largely a surrogate for direct participation; thus, it should not be necessary if the parties are there. Since, however, judicial review has come to focus on the paper record, so here too we may need to adapt. We will, as Judge Wald suggests, have to evolve a response to each concern. In the meantime, there are some preliminary answers or guideposts.

First, to meet the dictates of *Overton Park*, sufficiently diverse interests need to be represented to ensure that the relevant factors will be raised and considered. On a practical level, the convening process needs to be one that will help identify the parties that will be significantly affected and will also provide notice to those who were not picked up by direct contacts. Thus, the answer to the question of which groups should be represented is that all who represent parties that would be significantly affected by the rule are welcome.[58] The process, within the confines of available slots, is one of self selection; if too many wish to participate, it is usually accomplished through caucuses or through encouraging participation at meetings without formal membership on the committee.

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[56] Scalia, *Rulemaking as Politics, Chairman's Message*, 34 AD. L. REV. V (1982).

[57] Wald, *supra* note 16, at 24.

[58] See Paragraph I of the Appendix for an example of how one negotiating committee defined those eligible for membership.

Second, each interest should have equal access to the table. It may be that a coalition of allied interests will need to be formed and that the caucuses will need to select designated representatives. The individual representatives may be supported by "team" members who have particular viewpoints or an expertise that can be drawn upon as needed.

Third, a workable definition of "consensus" is that each interest represented at the table concurs in the result and that each representative signs the document. Each party then has the power to insist on sufficient information to make an informed choice as balanced against all other demands on resources and on the full consideration of those factors the party thinks are relevant.

### *Summary*

Overall, courts should be sensitive to the fact that there may be other ways than developing a massive record and extensive paper explanations of agency actions to determine whether the result is within the zone of reasonableness under the statute. If a range of interests is broad enough so that one may be confident that the relevant issues are raised and thrashed out, the court should at least require a challenger to come up with a good explanation as to why it "ain't necessarily so."[59] In that way, the court will transmit the proper incentives to all parties to develop a practical regulation within the confines of the statute.

Finally, courts should remember the final dictate of the *Overton Park* test: "[T]he court is not empowered to substitute its judgment for that of the agency." It should be even more so to the extent it is a collective judgment of interests spanning the issue.

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[59] Wald, *supra* note 16, at 22.

# APPENDIX*

# ENVIRONMENTAL PROTECTION AGENCY STANDARDS FOR WORKER PROTECTION FROM AGRICULTURAL PESTICIDES NEGOTIATING COMMITTEE

## ORGANIZATIONAL PROTOCOLS

### I. PARTICIPANTS

Any interest that would be substantially affected by an EPA standard governing worker exposure to pesticides may be represented on the negotiating committee. Parties may group together into caucuses to represent allied interests.

After negotiations have begun, additional parties may join the Committee only with the concurrence of the Committee and if within the number of parties permitted under the Committee's charter.

A senior representative of each party or their alternate must attend each full negotiating session. The designated representative may be accompanied by such other individuals as the representative believes is appropriate to represent his/her interest, but only the designated representative will have the privilege of the floor during the negotiations without Committee approval.

Participants are expected to represent the concerns and positions of the interests of their constituents and to ensure that any agreement developed by the Committee is acceptable to the organization from which the participant comes.

### II. DECISIONMAKING

The Committee will operate by consensus. Committee decisions will be made only with the concurrence of all interests represented.

Smaller working groups may be formed to address specific issues and to make recommendations to the Committee. Working groups are not authorized to make decisions for the Committee as a whole. Their meetings will be held between the full sessions. Working group meetings will be scheduled in the same location and time whenever possible. All committee members will be notified of all working group meetings.

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* Oct. 17, 1985

Meeting agendas will also be developed by consensus. The Committee will determine if information requests are reasonable and relevant.

If a deadlock or impasse is declared by any party, the facilitator will be available to help the deadlocked parties to try to resolve the impasse.

A caucus can be declared by any participant at any time.

## III. AGREEMENT

EPA is committed to using any consensus reached in these negotiations as the basis of a proposed rulemaking. The agreement reached will take the form of a written statement that will be signed by all parties.

## IV. SAFEGUARDS FOR THE PARTIES

All participants must act in good faith in all aspects of these negotiations. Specific offers, positions, or statements made during the negotiations may not be used by other parties in any other forum or as a basis for future litigaiton. Parties may withdraw from the negotiations at any time without prejudice. Personal attacks and prejudiced statements will not be tolerated. The proceedings will not be electronically recorded. No discussions characterizing the position of any party will be held with the press until the conclusion of the negotiations, even if a party withdraws.

All parties agree not to withhold relevant information. If a party believes it cannot or should not release such information, it will provide the substance of the information in some form (such as by aggregating data, by deleting non-relevant confidential information, or by providing summaries) or a general description of it and the reason for not providing it directly. All parties agree not to divulge information shared by others in confidence.

## V. OPEN PROCESS

The negotiations will be conducted under the Federal Advisory Committee Act (FACA). Negotiating sessions will be announced in the *Federal Register* prior to the meeting and, consistent with FACA requirements, will be open to the public. Minutes of Committee meetings will be kept and made available to the public on request.

## VI. SCHEDULE

Negotiating sessions will initially be held once each month. The first negotiating session is scheduled for November 4, 1985. Unless otherwise agreed upon, a deadline of four months for the negotiations will be established. The location of the meetings will be decided by the group.

The participants may discontinue negotiations at any time if they do not appear productive.

## VII. FACILITATOR

A neutral facilitator retained by EPA will work with all the parties to ensure that the process runs smoothly.

# WHEN SMOKE GETS IN YOUR EYES: REGULATORY NEGOTIATION AND THE PUBLIC INTEREST—EPA'S WOODSTOVE STANDARDS

By
William Funk*

*Regulatory negotiation is an alternative dispute resolution technique applied to rulemaking. Its recent development has occasioned much comment—almost uniformly positive and generally concerned with how to make regulatory negotiation more successful. Taking exception to this trend, Professor Funk in this article suggests that the nature of regulatory negotiation is subversive of a fundamental administrative law value—the search for the public interest. To prove his point, Professor Funk focuses on one "successful" EPA regulatory negotiation and shows how the process of regulatory negotiation blinded the participants to the public interest as reflected in the statutory requirements. Professor Funk concludes that regulatory negotiation should not play a large role in rulemaking before there has been a clear recognition of regulatory negotiation as a substitution of a private rights dispute resolution mechanism for a public interest determination. Only then can a full debate take place that assesses not only the pragmatic benefits of regulatory negotiation but also its costs in terms of undermining the legitimacy of administrative regulation.*

## I. Introduction

Regulatory negotiation is a recent development in administrative law. Philip Harter provided its first real description and justification in 1982.[1] According to Harter's analysis, informal rulemaking had become so complex and formalized that rulemak-

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[1] Harter, *Negotiating Regulations: A Cure for Malaise*, 71 Geo. L.J. 1 (1982). Actually, Harter's article in the form of a draft report for the Administrative Conference of the United States was widely circulated somewhat earlier.

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ings had degenerated into adversarial proceedings with the delay, expense, and dissatisfaction characteristic of such proceedings.[2] Consistent with parallel developments in alternative dispute resolution as a substitute for traditional litigation,[3] Harter recommended that at least certain regulations should be negotiated between the interested parties, including the agency issuing the regulation.[4] To avoid the necessity of substantial amendment of the Administrative Procedure Act[5] as well as other statutes, Harter suggested a scheme for negotiating regulations which he believed would not run afoul of current administrative law concepts. In short, this involved the negotiation of a *proposed* rule, which the agency would then publish as its proposed rule and thereafter treat pretty much as it would any proposed rule. In this way possible complications posed by *ex parte* restrictions[6] or the delegation doctrine[7] are minimized.

Since Harter's article, several agencies, including especially the Environmental Protection Agency (EPA), have experimented with negotiating proposed regulations according to Harter's formula, as reflected in the recommendations of the Administrative Conference of the United States.[8] Assessments of those experiments have been uniformly positive, even where the regulatory negotiation failed to result in a proposed or final regulation.[9]

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[2] *Id.* at 2-7.

[3] *See generally* R. FISHER & W. URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1981); G. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT (1983).

[4] Harter, *supra* note 1, at 7-8.

[5] 5 U.S.C. §§ 551-559 (1982).

[6] *See* Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1978). In *Home Box Office*, the court identified the publication of a proposed rule as the point at which any *ex parte* restrictions would begin.

[7] *See* Harter, *supra* note 1, at 107-09. The appropriateness of the government delegating to private parties the power to adopt what are, in essence, laws continues to be a debated topic. On one hand, there are concerns about the structure of the federal government. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936). On the other hand, there are due process concerns about possible bias. *See, e.g.*, Gibson v. Berryhill, 411 U.S. 564 (1973).

[8] *See* ACUS Recommendation 82-4 and 85-5 (codified at 1 C.F.R. §§ 305.82-4, 305.85-5 (1987)).

[9] *See, e.g.*, Perritt, *Negotiated Rulemaking and Administrative Law*, 38 ADMIN. L. REV. 471 (1986); *Dispute Resolution Forum* (Jan. 1986); Harter, *Regulatory Negotiation: The Experience So Far*, RESOLVE (Winter, 1984); Susskind & McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON

One of the most recent experiments resulted in an EPA proposed rule[10] to establish emission limitations for residential woodstoves under the Clean Air Act.[11]

It is the thesis of this Article that this proposed rule is not authorized by the Clean Air Act, and that the process of developing the rule by regulatory negotiation directly contributed to this unlawful proposal. Moreover, this Article concludes that the nature of regulatory negotiation has the tendency to obscure, if not pervert, the public interest to the benefit of private interests, and that the regulatory negotiation of the woodstove emission limitation is a case study of such a perversion.

## II. THE WOODSTOVE REGULATION AND THE CLEAN AIR ACT

### A. *Background*

Less than a decade ago, woodstoves were generally considered to be an economical and environmentally sound way to beat the energy crisis.[12] A godsend to large numbers of persons for whom the rapidly escalating cost of home heating fuel or electricity was a serious economic threat, woodstoves also were fueled by a renewable resource of great abundance in the United States.[13] Even today, when the energy crisis has faded into history, there are still about twelve million woodstoves in use with more than a half million new units added each year.[14]

With this increase in woodstove use, especially in population centers with easy access to cheap wood fuel, it was not long before

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REG. 133 (1985); Fiorino & Kirtz, *Breaking Down Walls: Negotiated Rulemaking at EPA*, 4 TEMP. ENVTL. L. & TECH. J. 29 (1986). After this Article was written, an article in *Legal Times* appeared criticizing both the theory and practice of regulatory negotiation: *see* Steinzor & Strauss, *Building a Consensus: Agencies Stressing 'Reg Neg' Approach*, Legal Times, Aug. 3, 1987, at 16.

[10] EPA Standards of Performance for New Stationary Sources, Standards of Performance for New Sources: Residential Wood Heaters, Proposed Rule, 52 Fed. Reg. 4994 (1987) [hereinafter Proposed Rule].

[11] The Clean Air Act of 1970, 42 U.S.C. §§ 7401-7642 (1982).

[12] Trevill, *Wood Stoves Glow Warmly Again in Millions of Homes*, SMITHSONIAN 55 (Oct. 1978).

[13] *Id.*

[14] *See* ENVIRONMENTAL PROTECTION AGENCY, REGULATORY IMPACT ANALYSIS, RESIDENTIAL WOOD HEATER NEW SOURCE PERFORMANCE STANDARD, 3-1 (Dec. 1, 1986) [hereinafter RIA].

people began to notice a haze in certain localities with the pungent odor of wood smoke. At the same time, air pollution monitors were showing increases in particulates during the woodstove heating season.[15] This situation was of concern both to state environmental and development offices, because not only might such an increase in particulates possibly affect persons' health, but also any increase in particulates could endanger the state's compliance with nationally required ambient air standards for particulates.[16] Non-compliance could threaten the growth of the economy in the state by triggering a number of federal responses, including a construction ban on new sources of pollution.[17]

In Oregon, public officials recognized that a reduction in particulates from woodstoves would enable industrial sources to pollute more, while still achieving and maintaining compliance with national requirements.[18] Consequently, in 1983, with the support of both environmentalists and the Associated Oregon Industries, Oregon passed a law to ban the sale of new woodstoves in Oregon unless they were certified as not exceeding a specified emission limit, as determined by the State Environmental Quality Commission.[19] In 1985, the regulations were put in place to be effective in 1986, and Oregon was able to amend its State Implementation Plan to free up a portion of its airshed for industrial and commercial development.[20] Oregon was not alone in its actions. Other states and even cities began to consider and adopt various limitations on woodstoves.[21] Unfortunately for woodstove manufacturers, however, these limitations were not always uniform, and even if one jurisdiction's limitation was the same as another's, its test method probably was not, requiring the manufacturer to undergo a separate, costly and time consuming test before it could sell its woodstove in the jurisdiction.[22]

At the same time, on another front altogether, certain states and environmental groups were attempting to force EPA to determine that Polycyclic Organic Matter (POM) is a pollutant requiring regulation.[23] POM is a generic term which includes hundreds of chemical substances with two or more ring structures.[24] POM emissions in the air are generally produced by combustion processes, especially where combustion is incomplete.[25] Major contributors to POM in the ambient air include coke production; mobile sources, such as cars, trucks, and planes; commercial and industrial incineration; forest fires; and residential woodstoves and fireplaces.[26]

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[15] Oregon Dep't of Envtl. Quality, Air Quality Annual Report 11-12 (1981).

[16] *See* 42 U.S.C. § 7410 (1982).

[17] *See, e.g.*, 42 U.S.C. § 7413(a)(5) (1982).

[18] *See* Maviglio, *All Eyes on Oregon*, Wood-N-Energy 28 (Nov. 1983).

[19] 1983 Or. Laws ch. 333 § 5-8 (Woodstove Emission Control) (codified at Or. Rev. Stat. §§ 468.630-655).

[20] Or. Rev. Stat. § 468.650 (1983).

[21] *See* RIA, *supra* note 14, at 5-2.

[22] *See* Maviglio, *supra* note 18, at 30.

In 1977, an amendment to the Clean Air Act, section 122, had required EPA to determine within one year whether certain pollutants, including POM, would contribute to air pollution reasonably anticipated to endanger public health.[27] If EPA made such a determination, EPA was then to regulate that pollutant either by establishing a national hazardous air pollutant emission standard, a new source performance standard, a national ambient air quality standard, or by a combination of these authorities.[28] Despite section 122 and its deadline, EPA was recalcitrant in making the necessary studies.[29] After a lawsuit was brought to force its consideration of POM, EPA in 1984 reached a determination that there was "significant uncertainty as to the human cancer risk due to POM in the ambient air."[30] Consequently, EPA was unable to determine that POM was a pollutant that threatened the public health within the meaning of section 122.[31] This conclusion, however, was challenged in lawsuits brought by the Natural Resources Defense Council (NRDC) and the state of New York.[32] These lawsuits noted that EPA had conceded that some POM mixtures are a cancer causing agent in humans and that all POM mixtures produced by burning are carcinogenic and mutagenic.[33] As an airborne carcinogen, POM mixtures would be regulated under section 112 of the Clean Air Act[34] dealing with hazardous air pollutants, and EPA had evidenced a noticeable reluctance to regulate even the most hazardous pollutants under that section.[35]

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[23] *See, e.g.*, New York v. Gorsuch, 82 Civ. 4695 (S.D.N.Y. 1982).

[24] *See* Final Decision, Regulation of Polycyclic Organic Matter Under the Clean Air Act, 49 Fed. Reg. 31,680 (1984).

[25] *Id.*

[26] *Id.*

[27] *See* 42 U.S.C. § 7422 (1982).

[28] *Id.*

[29] *See supra* note 23.

[30] Final Decision, *supra* note 24, at 31,682.

[31] *Id.*

[32] *See* NRDC v. Alm, No. 84-1473 (D.C. Cir. filed Sept. 18, 1984); New York v. Thomas, No. 84-1472 (D.C. Cir. filed Sept. 18, 1984).

EPA's litigation experience under section 112 was not good. Both the Sierra Club and the state of New York had already obtained injunctions forcing EPA to propose regulations under section 112 for other pollutants.[36] On the other hand, so long as New York and the NRDC were on the "outside" trying to force EPA to act against its will, EPA could avoid a final outcome favorable to their desires for an extended period.[37] For both sides, settlement was preferable to a judicial decision, and in May 1986 a settlement agreement was formalized between the parties.[38] The agreement required EPA to take action in three areas with respect to sources of POMs: residential woodstoves, municipal waste combustors, and coal and oil combustion emissions.[39] With respect to woodstoves, the agreement required EPA to issue a proposed rule proposing standards for woodstoves under section 111 of the Act (or a proposal that no standards would be appropriate) by January 31, 1987, and a final action on that proposal by January 31, 1988.[40]

Under the pressure of the lawsuit, this process had already begun. In August of 1985, EPA announced its plans to develop new source performance standards for residential woodstoves.[41] The EPA indicated that it intended to utilize "an expedited standards development approach based on the available data,"[42] rather than the traditional standard setting approach. In early 1986, EPA had announced its intent to form an advisory committee to negotiate the proposed new source performance standards for woodstoves.[43] Within a month, the advisory committee was formed,[44] and meetings soon began.[45] The committee included representatives of the various groups that had been active in the state regulation of woodstoves and the EPA/NRDC dispute over the regulation of POMs, and which, in the words of EPA, had "a definable stake in the outcome of the proposed rule."[46] Specifically, there were sixteen members, including one EPA representative; one NRDC representative; representatives from the states of Oregon, Vermont, New York, and Colorado; a representative of the Wood Heating Alliance, the woodstove manufacturers' organization, as well as representatives of two specific manufacturers; representatives of two manufacturers of catalysts for woodstoves; and a representative of the Consumer Federation of America, as a "consumer" representative.[47]

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[33] *See id.*

[34] 42 U.S.C. § 7412 (1982).

[35] *See* W. RODGERS, 1 ENVIRONMENTAL LAW: AIR AND WATER 344 (1986).

[36] *See* New York v. Gorsuch, 554 F. Supp. 1060 (S.D.N.Y. 1983) (inorganic arsenic); Sierra Club v. Gorsuch, 551 F. Supp. 785 (D.C. Cal. 1982) (radionuclides).

[37] *See* Doniger, *Negotiated Rulemaking at EPA: The Examples of Wood Stove Emissions and Truck Engine Emissions*, 17 E.L.R. 10,251-52 (1987). *See also* Graham, *The Failure of Agency-Forcing: The Regulation of Airborne Carcinogens Under Section 112 of the Clean Air Act*, 1985 DUKE L.J. 100, 109-15.

[38] New York v. Thomas, No. 84-1472 (D.C. Cir. May 9, 1986) (Settlement Agreement).

[39] *Id.*

[40] *Id.*

[41] EPA, Standards of Performance for New Stationary Sources: Residential Wood Combustion, Advance Notice of Proposed Rulemaking, 50 Fed. Reg. 31,504 (1985).

All of these organizations had a "stake" in the outcome of the proposed rule; for each the proposed rule was a means to a particular end which was to the benefit of their particular organizations. For the Wood Heating Alliance and the manufacturers it represented, a national emissions limit on woodstoves would likely forestall the burgeoning movement by states and localities to create their own limitations.[48] This would both reduce the likelihood of different standards and test methods as well as maximize the influence the Alliance could have on the substantive standards while minimizing the burden of obtaining that influence. For the states with their own woodstove regulations, the negotiation of a federal rule would perhaps enable them to achieve a substantive regulation under federal law that would allow federal funding of local enforcement, federal enforcement, or federally mandated local enforcement—in any case, reducing their internal funding difficulties. For states considering woodstove regulations, the regulatory negotiation would enable them to achieve the substantive regulation they sought without the financial or political cost within their state of developing the regulation. For the NRDC, a rule regulating woodstove emissions, whatever its basis or justification, would have the effect of reducing the emission of a pollutant NRDC believed to be harmful. For EPA, any new source performance standard rule to which the various states and NRDC would agree would eliminate the resource intensive litigation to which EPA would otherwise be subjected and would eliminate the demand for regulating POM as a hazardous pollutant. Even the Consumer Federation of America could further its "consumer" goals by using the regulation to promote advertising and labeling requirements that would facilitate comparison shopping and consumer awareness.

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[42] *Id.* at 31,505.

[43] *See* EPA, Intent To Form an Advisory Committee To Negotiate New Source Performance Standards for Residential Wood Combustion Units, 51 Fed. Reg. 4800 (1986).

[44] Environmental Protection Agency Advisory Committee Charter, New Source Performance Standards for Residential Wood Combustion Units, Negotiated Rulemaking Advisory Committee, Establishment and Open Meeting (Mar. 18, 1986). *See also* EPA, Notice of Formation of Advisory Committee, 51 Fed. Reg. 8241 (1986).

[45] The committee met on six occasions (an occasion might involve one or more days) beginning on March 19, 1986 and ending on August 21, 1986. *See* EPA Standards of Performance for New Stationary Sources: Residential Wood Heaters, Notice of Results of Rulemaking Negotiation, 51 Fed. Reg. 34,672, 34,673 (1986) [hereinafter Notice of Results].

[46] EPA, Intent to Form an Advisory Committee to Negotiate New Source Performance Standards for Residential Wood Combustion Units, 51 Fed. Reg. 4800-01 (1986).

[47] *See* Notice of Results, *supra* note 45, at app. A.

### *B. The Law*

On February 18, 1987, the EPA published in the Federal Register a proposed rule to regulate residential woodstoves as new stationary sources under sections 111 and 114 of the Clean Air Act.[49] Under section 111, a "stationary source" is "any building, structure, facility, or installation which emits or may emit any air pollutant."[50] The regulatory scheme created by the section requires the Administrator of EPA to publish (and from time to time to revise) a list of "categories of stationary sources" if in his judgment the category contributes significantly to air pollution.[51] Thereafter, the Administrator is to publish "standards of performance" for "new sources" in those categories.[52] The term "standard of performance" is defined differently depending on whether the stationary source is one fired by fossil fuels or not.[53] With respect to non-fossil fuel fired stationary sources, a standard of performance is a standard "establishing allowable emission limitations" for those sources, which reflects the degree of emission limitation achievable through the application of the "best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated."[54] After the effective date of any standard of performance under this section, it is unlawful for "any owner or operator of any new source to operate such source in violation" of that standard.[55]

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[48] *See* Notice of Results, *supra* note 45, at 34,672-73.

[49] 42 U.S.C. §§ 7411, 7414 (1982).

[50] 42 U.S.C. § 7411(a)(3) (1982).

[51] 42 U.S.C. § 7411(b)(1)(A) (1982).

In the ordinary course of events, a new source performance standard for a particular pollutant would prohibit an owner or operator of a facility from causing to be discharged into the atmosphere from the facility any gases which contain more of the pollutant than a specified amount, measured usually by the opacity of the discharge into the air[56] or by a ratio of the weight of the pollutant to the weight of the product produced,[57] to the volume of exhaust gas,[58] or to the weight of the feedstock.[59] One of the benefits of a performance standard, such as these, is that it ensures the achievement of the desired outcome while leaving to the regulated industry and technological innovation the means to achieve that outcome.

Such a standard is not, however, always possible or feasible. For example, with "fugitive emissions," emissions which are produced by some activity, but which are not capable of being funnelled into some stack, it may not be possible to express a limitation in terms of a performance standard. In *Adamo Wrecking v. United States*,[60] the United States Supreme Court construed strictly the parallel term in section 112 of the Act, holding that a standard imposing a required work practice to reduce emissions was not authorized under the Act. As a result, Congress amended sections 111 and 112 to provide that when the Administrator finds that it is not feasible to establish or enforce a performance standard, the Administrator may instead promulgate a work practice requirement or a design, equipment, or operational standard (or combination thereof), including any requirements necessary to assure proper operation and maintenance of any required design or equipment.[61] Reflecting its preference for performance standards,[62] however, Congress limited the circumstances in which the Administrator may find the necessary lack of feasibility to two: where the pollutant cannot technically or legally be emitted through a conveyance designed to capture the pollutant or where "the application of measurement methodology . . . is not practicable due to technological or economic limitations."[63] Where the Administrator makes the necessary finding, the resulting work practice requirement or design, equipment, or operating standard is then treated for enforcement purposes as a performance standard.[64]

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[52] 42 U.S.C. § 7411(b)(1)(B) (1982).

[53] 42 U.S.C. § 7411(a)(1) (1982).

[54] *Id.*

[55] 42 U.S.C. § 7411(e) (1982).

[56] *See, e.g.*, 40 C.F.R. § 60.72(a)(2) (1986) (standard for particulates from nitric acid plants).

[57] *See, e.g.*, 40 C.F.R. § 60.682 (1986) (standard for particulate matter emitted from wool fiberglass insulation manufacturing plants).

[58] *See, e.g.*, 40 C.F.R. § 60.132(a)(1) (1986) (standard for particulates from secondary brass and bronze production plants).

[59] *See, e.g.*, 40 C.F.R. § 60.62(a)(1) (1986) (standard for particulates from Portland cement plants).

Section 114 of the Clean Air Act,[65] the other provision of the Act EPA cited for authority for the proposed woodstove regulation,[66] relates for purposes relevant here to the enforcement of a performance standard. It provides that, for the purpose of determining whether someone is violating a performance standard or for carrying out any provision of the Act, the Administrator may require "any person who owns or operates any emission source or who is subject to any requirement" of the Act to: establish and maintain records, make reports, use designated monitoring systems, sample emissions in accordance with the Administrator's directions, and "provide such other information as [the Administrator] may reasonably require."[67] In addition, the Administrator is granted a right of entry to any premises of a person required to keep records and may at reasonable times have access to any required monitoring equipment or to sample emissions.[68]

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[60] Adamo Wrecking v. United States, 434 U.S. 275 (1978).

[61] *See*, Clean Air Act Amendments of 1977, § 109(e), 42 U.S.C. § 7411(h) (1982).

[62] *See* S. Rep. No. 127, 95th Cong., 1st Sess. 44 (1977) ("While the Committee has a strong preference for numerical emission limitations, it recognizes that in a very few limited cases, other approaches may be necessary").

[63] 42 U.S.C. § 7411(h)(2) (1982).

[64] 42 U.S.C. § 7411(h)(5) (1982).

[65] 42 U.S.C. § 7414 (1982).

[66] *See* Proposed Rule, *supra* note 10, at 5013.

### *C. The Regulation*

The proposed woodstove regulation applies to residential wood heaters, including woodstoves used for cooking and heaters using both wood and coal. It does not apply to fireplaces.[69] The proposed rule sets different standards for woodstoves with a catalytic combuster and those without.[70] Both these standards are phased in, with the first and looser standard applicable to stoves manufactured after July 1, 1988 or sold at retail after July 1, 1990, and the second, stricter standard applicable to stoves manufactured after July 1, 1990 or sold at retail after July 1, 1992.[71] A special delayed compliance date is available for small manufacturers.[72] The standard only relates to emissions of particulates, not to emissions of carbon monoxide or POM.[73]

After these dates, all woodstoves sold must display a permanent label indicating whether they have been certified to comply with the requisite emission limit for particulates.[74] In addition, the stove must also have both a temporary label with certain information to aid consumers in the purchase of a woodstove and an operator's manual meeting the regulation's specifications.[75] If the woodstove has a catalytic combuster, the stove must also include a warranty to replace the catalytic combuster within two years for any defect affecting its operation and within three years for structural integrity.[76] In order for a manufacturer of woodstoves to obtain certification for a woodstove model, he must apply to EPA for a certificate of compliance.[77] Among other things, the application must include the results of a valid certification test[78] conducted by an EPA approved laboratory.[79] Manufacturers, retailers, and the laboratories are all required to maintain specified records to aid in enforcement and monitoring of the manufacturing and testing process.[80]

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[67] 42 U.S.C. § 7414(a)(1) (1982).

[68] 42 U.S.C. § 7414(a)(2) (1982).

[69] *See* Proposed Rule, *supra* note 10, at 5015 (to be codified at 40 C.F.R. §§ 60.530(h), 60.531).

[70] *See* Proposed Rule, *supra* note 10, at 5015 (to be codified at 40 C.F.R. §§ 60,532(a), (b)).

[71] *See id.*

[72] *See* Proposed Rule, *supra* note 10, at 5015 (to be codified at 40 C.F.R. § 60.530(d)).

[73] *See* Proposed Rule, *supra* note 10, at 4998.

[74] *See* Proposed Rule, *supra* note 10, at 5020-21 (to be codified at 40 C.F.R. §§ 60.536(a)-(h)).

[75] *See* Proposed Rule, *supra* note 10, at 5021-22 (to be codified at 40 C.F.R.

The prohibitions in the regulation run primarily to the manufacturers and retailers of woodstoves, not to the operators of the stoves.[81] Operators are, however, prohibited from operating a stove that does not have a required label, which has had a catalytic combuster removed, that has been altered to increase emissions, or other than in accordance with the operating instructions.[82] Nevertheless, the proposed plan of enforcement only reaches manufacturers, retailers, and laboratories; there is no plan to enforce the regulation in any way against operators.[83]

## III. LEGAL PROBLEMS

There is some difficulty in fitting the proposed rule regulating woodstoves outlined above to the statutory scheme described earlier. There are two principal problems: first, it is questionable whether mass-produced consumer items, such as woodstoves, are

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§§ 60.536(i)-(k)).

[76] *See* Proposed Rule, *supra* note 10, at 5016 (to be codified at 40 C.F.R. § 60.533(c)).

[77] *See* Proposed Rule, *supra* note 10, at 5016 (to be codified at 40 C.F.R. § 60.533(b)).

[78] *See* Proposed Rule, *supra* note 10, at 5016 (to be codified at 40 C.F.R. § 60.533(e)(i)).

[79] *See* Proposed Rule, *supra* note 10, at 5016 (to be codified at 40 C.F.R. § 60.533(f)(2)).

[80] *See* Proposed Rule, *supra* note 10, at 5022 (to be codified at 40 C.F.R. § 60.537).

[81] *See* Proposed Rule, *supra* note 10, at 5023 (to be codified at 40 C.F.R. §§ 60.538(b)-(e)).

[82] *See* Proposed Rule, *supra* note 10, at 5023 (to be codified at 40 C.F.R. §§ 60.538(a), (f)-(h)).

[83] *See* Proposed Rule, *supra* note 10, at 5006-11.

within the meaning of stationary source under section 111 of the Act; second, it is exceptionally doubtful that the requirements imposed on the manufacturers and retailers of woodstoves are authorized by the Act.

### *A. Woodstoves as "Sources"*

The definition of a "stationary source" in section 111 of the Act is undoubtedly broad.[84] Moreover, the Supreme Court has indicated that EPA has been afforded a fair degree of latitude in its interpretation of the term. In *Chevron, U.S.A. v. NRDC*,[85] the Court held that EPA's interpretation of the term "source" as including an entire plant, rather than as particular pieces of process equipment, was reasonable and not foreclosed by the statutory language or the legislative history of the Clean Air Act.[86] While this decision directly related to EPA's interpretation of the term "source" as used in the non-attainment provisions of the Act,[87] there is no doubt that the thrust of that case is far broader.[88] Nonetheless, it cannot be said that *Chevron* found that Congress had failed to foreclose any definition of "source" by EPA, or that other definitions by EPA of the term "source" in other contexts would thereafter only have to satisfy a general reasonableness standard. For purposes relevant here, the question remains whether either the statutory language or legislative history indicates that Congress addressed the issue in a manner inconsistent with EPA's interpretation and, if not, whether EPA's interpretation is a reasonable one.[89]

As an initial matter, the terms "building, structure, facility, or installation"[90] are clearly not the terms one would choose to use to indicate a consumer product a person buys at a store, brings home, and uses there. It cannot be gainsaid that a woodstove is installed in a home, but one normally does not refer to things as "installations" merely because they have been installed. Nor can it be argued that the "source" is the building or structure which contains the woodstove, because EPA specifically defined "the source category [as] 'residential wood heaters,' "[91] not as buildings or structures with residential wood heaters.

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[84] *See* 42 U.S.C. § 7411(a)(3) (1982).

[85] 467 U.S. 837 (1984).

[86] *Id.*

[87] 42 U.S.C. §§ 7501-7508 (1982).

[88] *See, e.g.*, Chemical Mfr. Ass'n v. NRDC, 470 U.S. 116 (1985).

[89] *See* Chevron, U.S.A. v. NRDC, 467 U.S. 837, 842-44 (1984).

[90] 42 U.S.C. § 7411(a)(3) (1982).

Not only do the terms not lend themselves to an interpretation including mass-produced consumer products, but the statutory scheme also seems inconsistent with such coverage. Thus, the only consumer products *ever* regulated by EPA under the Clean Air Act have been cars and trucks.[92] Yet these products are specifically regulated under an entirely different part of the Act,[93] and the method of regulation there is entirely different from that found in other portions of the Act. Undoubtedly the unique position of the automobile industry in the American economy and the unique contribution to air pollution caused by motor vehicles in part explain the separate treatment under the Act. More important, however, is the need for a different *form* of regulation for manufactured consumer products which cause air pollution as compared to the method used to regulate the air pollution from large-scale industrial processes. Thus, for example, rather than utilize performance standards applicable to and enforceable against each owner or operator of a car or truck, the methodology of section 111 standards, the Act makes standards for moving sources applicable to the manufacturer (or importer) of the cars and trucks.

The legislative history reflects a similar perception of a "stationary source." The term first appeared in the Clean Air Act Amendments of 1970[94] and has not changed since. The House Report described the purpose of the new source performance standards as "prevent[ing] the occurrence anywhere in the United States of significant air pollution problems arising from such sources . . . because they are large-scale polluters."[95] The report explained the need for *federal* standards as the need to "preclude efforts on the part of States to compete with each other in trying to attract *new plants and facilities* without assuring adequate control[s]. . . ."[96]

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[91] EPA, Listing of Residential Wood Heaters for Development of New Source Performance Standards, 52 Fed. Reg. 5065 (1987).

[92] *See* 40 C.F.R. pts. 85-86 (1986).

[93] *See* 42 U.S.C. §§ 7521-51 (1982).

[94] Section 111(a)(3), Pub. L. No. 91-604, 84 Stat. 1676 (1970).

[95] H.R. Rep. No. 1146, 91st Cong., 2d Sess. 3 (1970).

[96] *Id.* (emphasis added).

In the Senate, where the definition originated, the committee report described the type of facilities at which the provision was aimed: "[m]ajor new facilities such as electric generating plants, kraft pulp mills, petroleum refineries, steel mills, primary smelting plants, and various other commercial and industrial operations. . . ."[97] The report went on that while these were "relevant examples of sources subject to this provision, . . . other categories of *major stationary sources*" might also be subject to the provision.[98] The following list of sources was printed which the administration said it would subject to the provisions: cement manufacturing, coal cleaning operations, coke byproduct manufacturing, cotton ginning, ferroalloy plants, grain milling and handling operations, gray iron foundries, iron and steel operation, nitric acid manufacturing, nonferrous metallurgical operations (i.e., aluminum reduction, copper, lead, and zinc smelting), petroleum refining, phosphate manufacturing, phosphoric acid manufacturing, pulp and paper mill operations, rendering plants, sulfuric acid manufacturing, soap and detergent manufacturing, municipal incinerators, and steam electric powerplants.[99]

The Senate bill also required the establishment of "a system of preconstruction review and certification of design *and location* of new sources. . . ."[100] Such a requirement makes abundantly clear that the term "stationary source" could not include mass-produced consumer products such as woodstoves, for a preconstruction review and approval of the place where a mass-produced consumer item might be located is nonsensical.

In conference, the definition of stationary source was not changed in any material manner. While the preconstruction certification system was dropped, it was undoubtedly as a result of the administration's strong objection that the system "would impose a heavy and unnecessary burden on both the Government and industry,"[101] not as the result of any change in understanding of the meaning of stationary source. As Senator Muskie indicated in a summary of the conference provisions, the new source performance standards would control "emissions from new or modified installations of major industries. These sources, important in themselves and involved in industries of national scope must be controlled . . . regardless of their location."[102] The summary then specified the same list of major industries contained in the Senate Report.[103]

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[97] S. Rep. No. 1196, 91st Cong., 2d Sess. 16 (1970).

[98] *Id.* (emphasis added).

[99] *See* S. Rep. No. 1196, 91st Cong., 2d Sess. 16 (1970).

[100] H.R. Rep. No. 1783, 91st Cong., 2d Sess. 46 (1970) (emphasis added).

[101] Letter from Elliot Richardson, Secretary of Health, Education and Welfare, to Senator Jennings Randolph, Chairman of the Senate Committee on Public Works (Nov. 17, 1970), *reprinted in* 116 Cong. Rec. 42,389, 42,390 (1970).

In short, the Clean Air Act Amendments of 1970 adopted a definition of stationary source specifically intended to reach only industrial and commercial operations. The definition adopted, the regulatory scheme, and the legislative history all reinforce the conclusion that coverage of consumer products was not intended and would be inconsistent with the statutory structure.

There has been no amendment of the definition of stationary source since its adoption in 1970. Nor has there been any change to other provisions of the Act that would suggest a different interpretation from that originally understood. For example, the House Report to the bill that became the 1977 amendments to the Clean Air Act[104] continually refers to new sources under section 111 as "large new pollution sources,"[105] and the entire discussion of the purpose of the section relates to concerns about achieving the most efficient control of industrial sources of pollution. Nothing in the legislative history of the 1977 amendments provides any support for extending section 111 to consumer products in general or woodstoves in particular.

### B. Manufacturers and Retailers as Owners and Operators

The proposed rule regulating woodstoves achieves its goals by imposing requirements on the sale of woodstoves by "commercial owners." A "commercial owner" is *not* someone who uses a woodstove for heating at all. A "commercial owner" is a person who owns or controls a woodstove in the course of manufacture, importation, distribution, or sale of a woodstove—in other words, anyone who has title to a woodstove in the course of its manufacture or sale.[106] Commercial owners are prohibited from advertising, offering, or selling any woodstove unless it includes the required owner's manual and combuster warranty, if applicable, and has been tested, certified, and labeled in accordance with the regulation.[107]

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[102] 116 CONG. REC. 42,385 (1970).

[103] *Id.*

[104] Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1977).

[105] H.R. REP. No. 294, 95th Cong., 1st Sess. 184 (1977). *See also* "large new source of pollution," *id.*; "large new pollution source," *id.* at 185; "large new fuel-burning stationary sources," *id.* at 186; "major new sources," *id.*; "large new sources," *id.*

To students of the regulatory process, this form of regulation should appear familiar, but not as the method of regulation under section 111 of the Clean Air Act. It is, for example, the method for regulating mobile sources under title II of the Clean Air Act[108] and the method for regulating consumer products under the Consumer Product Safety Act and other acts involving consumer products.[109] That is, in order to regulate the performance of consumer products, the law authorizes the agency to prescribe a standard applicable to the consumer product and enforceable against the manufacturer or importer of the consumer product.[110] The means of enforcement are through testing of representative models of the consumer product and then certification of compliance based on the results of that testing.[111] Manufacturer instructions, warranties, labeling and recordkeeping are also important aspects of the enforcement scheme.[112]

While the regulatory method used in the woodstove regulation is familiar, the statutory scheme for new source performance standards is noticeably different from the statutory provisions governing the regulatory schemes for other consumer products. Most obvious is the fact that section 111 only applies to "owners or operators" of sources;[113] there is no mention of manufacturers or importers of sources, unlike every other statutory scheme governing consumer products. No doubt the limitation of section 111 to owners or operators is the reason why the proposed regulation defines manufacturers, importers, and retailers of woodstoves as "commercial owners," rather than using their normal appellation.

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[106] *See* Proposed Rule, *supra* note 10, at 5015 (to be codified at 40 C.F.R. § 60.531).

[107] *See* Proposed Rule, *supra* note 10, at 5023 (to be codified at 40 C.F.R. §§ 60.538(c)-(e)).

[108] *See* 40 C.F.R. pt. 86 (1986). *See also* 42 U.S.C. §§ 7521-51 (1982).

[109] *See* 15 U.S.C. §§ 2051-83 (1982). *See also* National Appliance Energy Conservation Act of 1987, Pub. L. No. 100-12, 101 Stat. 103 (1987).

[110] *See, e.g.*, 42 U.S.C. §§ 7521-22 (1982); 15 U.S.C. § 2068 (1982).

[111] *See, e.g.*, 42 U.S.C. § 7525 (1982); 15 U.S.C. § 2063 (1982).

[112] *See, e.g.*, 42 U.S.C. §§ 7541(a), (c)(3), 7542 (1982); 15 U.S.C. §§ 2063(c), 2065 (1982).

[113] *See* 42 U.S.C. § 7411(e) (1982).

EPA purports to rely on the definition of "owner or operator" in section 111, which states that it means "any person who owns, leases, operates, controls, or supervises a stationary source."[114] In context, this definition means a person who "owns" or "controls" a source when it is in operation and capable of polluting. The awkwardness of using ownership or control as a surrogate for identifying the manufacturer, importer, distributer, or retailer is apparent even in the regulatory definition of "commercial owner" as one who owns or controls a woodstove "in the course of manufacture, importation, distribution, or sale."[115] The impossibility of using such incidental ownership as a shoehorn to regulation is made clear by the statutory definition of a prohibited act. Thus, section 111 only makes it unlawful for an owner or operator "to operate such source in violation of any standard of performance applicable to such source."[116] Unlike statutes requiring standards of performance for consumer products, nothing in section 111 even suggests that the sale or offer for sale of a product might be unlawful.[117] Under section 111, whether the "standard of performance" is an emission limitation, work practice, or design, equipment, or operational standard, the regulatory scheme is to limit the owner or operator in the *operation* of the source. For example, if there is a particular equipment requirement, the owner or operator must not operate the source except by using that prescribed equipment.[118]

Yet EPA's proposed rule does not address the manufacturers' or retailers' operation of woodstoves; it addresses their sale of woodstoves, by prohibiting the sale of stoves not manufactured, certified, and labeled in accordance with EPA's requirements. For this there is no authority in section 111. Perhaps for this reason, EPA also invokes section 114 as authority for its proposed rule.[119]

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[114] 42 U.S.C. § 7411(a)(5) (1982).

[115] Proposed Rule, *supra* note 10, at 5015 (to be codified at 40 C.F.R. § 60.531).

[116] 42 U.S.C. § 7411(e) (1982).

[117] *Compare* 42 U.S.C. § 7522(a) (1982); 15 U.S.C. § 2068(a) (1982).

[118] *See, e.g.*, 40 C.F.R. § 60.622(a) (1986).

[119] *See* Proposed Rule, *supra* note 10, at 5014.

Section 114 is titled "Recordkeeping, inspections, monitoring, and entry."[120] This suggests that it is a section providing aids to enforcement of substantive requirements found elsewhere, not an independent source of authority for substantive standards. The text confirms this impression. Section 114 grants several enforcement powers to EPA for three generic purposes: the developing of regulations, determining whether any person is in violation of a standard, and the "carrying out" of any provision of the Act.[121] Clearly, EPA's proposed regulation prohibiting manufacturers from selling uncertified stoves does not serve either of the first two purposes, and it strains the statute's language to the breaking point to say that a prohibition on the sale of uncertified wood stoves "carries out" a restriction under section 111 on the "operation" of woodstoves in violation of a standard. Moreover, the specific authorities granted to EPA by section 114 do not include the power to ban manufacturers' and retailers' sales.

First, EPA's authority under section 114 is limited to persons who own or operate a source or who otherwise are subject to a requirement of the Act.[122] As indicated above,[123] manufacturers and retailers of woodstoves are not properly "owners" of sources within the meaning of the Act. Nor are they otherwise subject to a requirement of the Act. Section 114 does not extend EPA's jurisdiction to persons not otherwise subject to the Act, rather it grants specific investigative and enforcement authority with respect to persons who *are* subject to substantive limitations imposed elsewhere in the Act.

Second, even with respect to persons subject to EPA's jurisdiction, section 114's authorities clearly do not include prohibiting the sale of consumer items. To the contrary, consistent with the title of the section, the authorities granted are limited to requiring persons to establish and maintain records; make reports; install, use, and maintain monitoring equipment; sample emissions from the person's source; and provide other information required by EPA.[124] These requirements are a far cry from prohibiting a manufacturer or a retailer from selling a particular consumer good that EPA has not certified.

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[120] 42 U.S.C. § 7414 (1982).

[121] 42 U.S.C. §§ 7414(a)(i)-(iii) (1982).

[122] *See* 42 U.S.C. § 7414(a)(1) (1982).

[123] *See supra* note 115 and accompanying text.

[124] 42 U.S.C. §§ 7414(a)(1)(A)-(E) (1982).

In sum, there is simply no authority in section 111 or 114 of the Clean Air Act for EPA to prohibit the sale of certain types of consumer goods. The clear authority granted by section 111 is to regulate the *operation* of stationary sources of pollution. EPA's authority to regulate that operation is broad, such that were woodstoves "stationary sources," EPA could prohibit the *operation* of woodstoves that did not comply with a specific equipment standard or which were not operated in a particular manner. EPA's broad authority to regulate the operation of stationary sources, however, should not be confused with a blank check to take whatever action it deems advisable to reduce pollution. This is especially so where Congress has time and again passed specific statutes governing the procedures and substantive requirements for restrictions on the sale of consumer goods, but has omitted any such procedures or requirements in sections 111 and 114. Indeed, section 114 explicitly exempts from its coverage the one area of pollution control directly involving consumer goods—mobile sources.[125]

### C. Other Legal Problems

In addition to the definition of stationary source and the regulation of sales by manufacturers and retailers, there are a number of less significant provisions which also are of doubtful validity. One of these relates to the "modification" of woodstoves. Under the proposed rule, woodstoves manufactured after July 1, 1988, or sold at retail after July 1, 1990, would have to meet the first stage emission standards in the rule.[126] In other words, these stoves would be considered "new sources" within the meaning of section 111. Section 111, however, is explicit that a "new source" includes any stationary source the "modification" of which occurs after the publication of standards applicable to new sources.[127] "Modification" is defined as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source. . . ."[128] The purpose of this definition is to assure that existing stationary sources which are modified with the result that they emit more pollution will be subjected to regulation like a newly constructed source.[129] For reasons unexplained in the preamble to the EPA proposed rule, the proposed rule would purport to repeal this statutory definition with respect to woodstoves manufactured before July 1, 1988.[130] While the reason for this rather extraordinary step is not set forth in the proposed rule, the probable explanation is that woodstove operators would likely make modifications that would otherwise trigger coverage under the rule, rather than manufacturers or retailers, and the entire thrust of the proposed rule is to place all enforceable restrictions on manufacturers and retailers of woodstoves rather than on woodstove operators.[131]

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[125] *See* 42 U.S.C. § 7414(a) (1982).

[126] *See* Proposed Rule, *supra* note 10, at 4995.

[127] 42 U.S.C. § 7411(a)(2) (1982).

[128] 42 U.S.C. § 7411(a)(4) (1982).

Another provision of doubtful validity is the delayed compliance date for small manufacturers of woodstoves.[132] The reason for the delay is explained in the proposal.[133] It serves two purposes: to reduce the "logjam" problem which might occur if too many manufacturers seek certification of their stoves from the small number of approved laboratories all at the same time and to reduce the economic impact of the regulation on small manufacturers.[134] Of these two purposes, the latter is clearly more important, because the proposed rule provides an independent solution to the problem of "logjam."[135] However, there is simply no authority in section 111 to delay compliance for certain manufacturers (or "owners or operators") because of their particular economic situations. Provision for special treatment of small manufacturers is often a part of regulatory statutes governing consumer products,[136] but there is no such provision or authority in section 111. While the economic effects of the standard of performance in general and on particular members of an industry are relevant to the appropriate standard to be adopted, there is no suggestion that those on whom the standard will impact hardest are to be afforded any special dispensation from the standard adopted.[137] To the contrary, where particular circumstances are to play a role, section 111 expressly makes provision for special treatment. Thus, the section provides for differentiation among classes, types, and sizes of sources (as opposed to among sizes of owners or operators),[138] provides for special treatment of small grain elevators,[139] and provides for waivers to reflect use of innovative technological systems of continuous emission reduction.[140] Consequently, there is simply no authority for the delayed compliance date for small manufacturers of woodstoves in the proposed rule.

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[129] *See, e.g.*, United States v. Narragansett Improv. Co., 571 F. Supp. 688 (D.R.I. 1983).

[130] *See* Proposed Rule, *supra* note 10, at 5014-15 (to be codified at 40 C.F.R. § 60.530(i)).

[131] *See* Proposed Rule, *supra* note 10, at 5006-11 (discussion of certification and enforcement).

[132] *See* Proposed Rule, *supra* note 10, at 5015 (to be codified at 40 C.F.R. § 60.530(d)).

[133] *See* Proposed Rule, *supra* note 10, at 5000.

[134] *See id.*

[135] *See* Proposed Rule, *supra* note 10, at 5016-17 (to be codified at 40 C.F.R. § 60.553(h)).

[136] *See, e.g.*, 42 U.S.C.A. § 6295(q) (Supp. 1987).

A third provision, which raises serious questions as to its validity, is the portion of the proposed rule which requires any woodstove sold meeting the applicable emission limits to have affixed to the stove a removable label that shows its estimated emissions, efficiency, and heat output data.[141] This label is in addition to the permanent label which identifies the stove as complying with EPA's emission limitation.[142] The explanation for the inclusion of the removable label requirement indicates that such a label will aid consumers in choosing a woodstove.[143] In other words, the removable label in effect has nothing to do with pollution control but is an informative label that will enable consumers to make more informed choices concerning woodstove purchases. Nothing in section 111 would authorize such a label.[144] Section 114 authorizes EPA to require persons who "own or operate" a source to "provide such . . . information as [EPA] may reasonably require."[145] As an initial matter, it is questionable whether the words "provide . . . information" should be interpreted to include requiring the placement of labels on consumer products so as to provide information to the public. Where a statutory scheme envisions labeling requirements, it normally provides for them explicitly.[146] Indeed, it was to those statutory schemes which the regulatory negotiators looked for models in designing its labeling requirement in the proposed regulation.[147] Even if the statutory language were capable of supporting some labeling requirement, it certainly should not support labeling requirements not directly related to controlling air pollution.

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[137] *Cf.* National Lime Ass'n v. EPA, 627 F.2d 416, 431-34 (D.C. Cir. 1980) (EPA must show that its standard reflects consideration of industry's range of variables and is not arbitrary or capricious).

[138] 42 U.S.C. § 7411(b)(2) (1982).

[139] 42 U.S.C. § 7411(i) (1982).

[140] 42 U.S.C. § 7411(j) (1982).

[141] *See* Proposed Rule, *supra* note 10, at 5023, 5055-58 (to be codified at 40 C.F.R. § 60.538(d)(1)(i), appen. I).

[142] Proposed Rule, *supra* note 10, at 5023 (to be codified at 40 C.F.R. § 60.538(c)).

[143] *See* Proposed Rule, *supra* note 10, at 5012.

[144] *Compare* 42 U.S.C. § 7411(h)(1) (1982) (requiring the EPA to include in any design or equipment standard "such requirements as will assure proper operation and maintenance").

These are but a few of the provisions of the proposed rule regulating emissions of woodstoves which have grave legal infirmities. As suggested by the foregoing, many of these problems arise primarily out of the attempt to regulate under section 111, relating to new stationary sources, a mass-produced consumer product such as woodstoves. This is not to say, however, that woodstoves, to the extent that they in fact are a cause of significant air pollution, are able to escape regulation under the Clean Air Act. To the contrary, woodstoves, like any other cause of a pollutant for which there is an ambient air quality standard,[148] are subject to control under State Implementation Plans pursuant to section 110 of the Act.[149] Unlike section 111 with its specific statutory scheme for regulating "stationary sources," section 110 broadly requires states to adopt, implement, and enforce plans to attain and then maintain both the primary and secondary ambient air quality standards for pollutants subject to those standards.[150] As a means of attacking air pollution from woodstoves, State Implementation Plans have the advantage over new source performance standards under section 111 by being able to tailor the regulatory system to the problem the woodstoves create within the state. Thus, in states where woodstoves by reason of climate or topography do not cause air pollution problems, the Plan could ignore them. On the other hand, in states or even subparts of states where woodstoves cause significant problems, different regulatory responses would be possible, from a statewide regulation of the sale of woodstoves, such as Oregon and Colorado have enacted, to more Draconian measures, such as a ban on or a permitting system for new woodstoves. None of the legal problems associated with trying to regulate woodstoves under section 111 would occur under section 110, because of the clear authority of the states under their police powers to regulate causes of pollution, and if a state fails to adopt an approved State Implementation Plan, the clear authority of EPA to mandate an implementation plan.[151]

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[145] 42 U.S.C. § 7414(a)(1)(E) (1982).

[146] *See, e.g.*, 42 U.S.C. § 7541(c)(3)(C) (1982); 15 U.S.C. § 2063(c) (1982); 42 U.S.C.A. § 6294 (Supp. 1987).

[147] *See* Environmental Protection Agency, Woodstove NSPS Issue Paper: Labeling 6-10 (1986).

[148] *See* 42 U.S.C. § 7409 (1982).

[149] 42 U.S.C. § 7410 (1982).

[150] *See* 42 U.S.C. § 7410(a)(2) (1982).

In addition to problems with the legal authority for various provisions of the proposed rule, there are also some substantive problems with the proposed rule. For example, in assessing the benefits of the proposed rule, the analysis measures the reduction in particulate matter emitted on the basis of an assumption that emissions from stoves in the field will be the same as the emissions from stoves in the laboratory, where, for example, the stove is loaded using dried dimensional lumber stacked in a specific manner.[152] Not only is this highly unrealistic, but also the emissions emitted in the laboratory test are in fact potentially 200 to 300 percent less than what will be emitted in real life.[153] It is not, however, the purpose of this Article to indicate each and every legal problem in the rule or to attack particular substantive regulatory decisions reflected in the proposed rule. Rather, it is the purpose to show that many of these problems are in whole or in part the result of the process by which the proposed rule was developed—regulatory negotiation.

## IV. THE REGULATORY NEGOTIATION

The product of the regulatory negotiation was a draft proposed rule, which EPA agreed to publish as its proposed rule.[154] Each of the members of the negotiating committee, including

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[151] *See* 42 U.S.C. § 7410(c) (1982).

[152] *See* RIA, *supra* note 14, at 8-12.

[153] *See* Meeting Notes on the Fourth Session of the Regulatory Negotiation for the Woodstoves NSPS 12 (June 11-12, 1986) (comments of Mr. Shelton).

[154] *See* EPA Negotiating Committee for New Source Performance Standard for Residential Wood Heaters, Agreement (Nov. 7, 1986).

EPA, concluded a formal agreement agreeing to support and not to criticize the proposed rule.[155] Each member, except EPA, agreed to support and not to challenge in court any final rule consistent with the proposed rule.[156]

Pursuant to the agreement, EPA drafted a preamble for the proposed rule; that is, an explanatory statement to precede the actual proposed regulatory language upon which the committee had agreed.[157] That preamble frankly admits that "its explanation of the reasons for particular committee decisions may not always reflect the reason why each individual committee member agreed to a particular provision of the regulation."[158] At another point, the preamble states that, while the committee concurred with the regulation as a whole, the committee did not necessarily concur in each provision. Rather, "some parties may have made concessions in one area, in exchange for concessions from other parties in other areas."[159] The necessary conclusion one must draw from these statements is that the preamble drafted by EPA is *not* an explanation of why or how the particular regulatory provisions were adopted. Instead, the preamble is an after-the-fact rationale attempting to justify decisions made by the negotiating committee for reasons we can never know.

In these circumstances it is entirely appropriate for readers to assess critically any explanation given by EPA for its action in light of possible alternative reasons suggested by the interests of the negotiating parties with a "stake" in the outcome, including EPA.

First, why did EPA decide to undertake this rulemaking at this time? EPA states that the rulemaking is a response to a determination that wood heaters cause air pollution which may reasonably be anticipated to endanger human health or welfare and that it began "as a response to the growing concern that wood smoke contributes to ambient air quality health problems."[160] As late as 1984, however, EPA was maintaining that there was insufficient data to support a determination that airborne POM threatened the public health.[161] Nor has EPA backed off from that position. Yet it was concern over POM that motivated the NRDC to sue EPA, and there is ample evidence that it was that suit that motivated EPA to institute the woodstove rulemaking. Not only does the preamble to the proposed rule suggest that motivation, but earlier EPA representatives had expressly stated that the lawsuit was "spurring EPA to regulate wood stove emissions as quickly as possible."[162] Yet, POM is not regulated by the proposed rule; only particulates are regulated, a pollutant already regulated under the national ambient air standards.

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[155] *Id.*

[156] *See id.*

[157] *See id.*

[158] Proposed Rule, *supra* note 10, at 4998.

[159] Proposed Rule, *supra* note 10, at 4995.

[160] Proposed Rule, *supra* note 10, at 4997.

Unquestionably, woodstoves are a major source of particulates, but "unlike most other air pollutants, they are distributed almost at ground level," having only localized effects.[163] EPA never thought to include woodstoves on its priority list of polluting stationary sources.[164] In addition, there never was any indication that controls on woodstoves by states and localities under State Implementation Plans were inadequate to attain and maintain ambient air quality standards or that local concerns inhibited states and localities from adopting necessary controls. To the contrary, the evidence was overwhelming that states and localities *were* willing and able to regulate woodstove emissions where they caused significant pollution. The preamble to the proposed rule acknowledged that two states and several localities had already imposed controls,[165] and the Regulatory Impact Analysis concluded that in the absence of a federal standard, other states and localities "almost certainly now would be adopting regulations."[166] Rather, the ability and willingness of states and localities to take effective regulatory action with respect to woodstoves seemed to be the *problem*.

Clearly, it was the problem from the woodstove industry's perspective. The industry realistically feared numerous different and conflicting standards and test procedures, and for this reason, actively sought a nationwide emission standard "in hopes of preventing individual states from enacting their own parochial standards."[167] The industry had already sponsored the development of a proposed national consensus standard for testing woodstove emissions under the sponsorship of the American Society of Testing and Materials.[168] It was just a short step to link arms with the NRDC and to support EPA's promulgation of a national emission standard. As the Regulatory Impact Analysis suggests, a primary reason for adopting a federal standard is that it would be cheaper than relying on state and local controls, especially for manufacturers.[169]

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[161] *See supra* note 30; *see also supra* note 24, at 31,682.

[162] *Emissions: Answers to your Questions*, WOOD-N-ENERGY 25 (Dec. 1985).

[163] Keough, *Sins of Emission*, SIERRA 22 (Jan./Feb. 1986).

[164] *See* 40 C.F.R. § 60.16 (1986).

[165] *See* Proposed Rule, *supra* note 10, at 4997.

[166] RIA, *supra* note 14, at 5-2.

In short, the evidence strongly suggests that EPA chose to regulate woodstoves at this time not because it had discovered they polluted, but because of particular pressures brought to bear on EPA by various groups with a "stake" in the outcome. Similarly, the evidence suggests that the choice of regulating under section 111 was not the result of disinterested consideration, but the result of the externally imposed imperatives of a national standard and EPA's adamant refusal to recognize POM as a hazardous pollutant to be regulated under section 112. One of the primary problems with respect to section 112 regulation is that it requires emission standards for both new and existing sources of the hazardous pollutant.[170] The regulation of the approximately twelve million existing woodstoves was viewed as not within the realm of the practicable.[171] Consequently, if state and local regulations were out of the question, only section 111, relating to stationary sources, was left.

Settling on section 111, however, did not eliminate all of the problems. Under section 111, if the new source performance standard applies to a pollutant for which there is no national ambient air quality standard, then states must establish standards of performance for *existing* stationary sources in the category of sources subject to the new source performance standard.[172] Thus, if EPA's woodstove regulation under section 111 set an emission limit for POM, for which there is no national ambient air quality standard, the effect would be to require states to set a standard of performance for all existing woodstoves, a task the states would find impossible. Consequently, even though it was the health concerns with respect to POM that led NRDC to force EPA to the rulemaking in the first place, given the legal requirements and the interests involved, it was not possible to set an emission standard for POM. Thus, the proposed rule only regulates emissions of particulate matter, for which there *is* a national ambient air quality standard, and therefore no standard for existing stoves is required. At the same time, because overall emissions will decrease, emissions of POM will also decrease. Therefore, NRDC can support the rule.

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[167] *Emissions: Answers to your Questions*, *supra* note 162, at 26. *See also* Keough, *supra* note 163, at 22, 27; Doniger, *supra* note 37, at 10,251-52 (1987).

[168] *Emissions: Answers to your Questions*, *supra* note 162, at 26.

[169] *See* RIA, *supra* note 14, at 5-2—5-3.

[170] *See* 42 U.S.C. § 7412(c)(1)(B) (1982).

[171] *See, e.g.*, RIA, *supra* note 14, at 5-5—5-6.

[172] *See* 42 U.S.C. § 7411(d)(1) (1982).

Concern with the regulation applying to existing woodstoves undoubtedly explains the rule's exclusion from coverage of "modifications" to woodstoves,[173] despite section 111's mandatory requirement for coverage as new sources of "modifications" to existing sources.[174]

Of course, using section 111 creates certain other problems, namely the contortions required to shoe-horn a consumer product regulation within a statutory scheme not designed for it. The public records of the regulatory negotiation at times reveal an awareness of these contortions. For example, during the second regulatory negotiation session, there was debate over whether the rule should regulate the manufacture of woodstoves.[175] One participant argued that the Act regulates the use of a source, not its manufacture, and because it is not feasible to regulate use, the "closest surrogate is the marketing of new stoves."[176] In other words, the participant recognized the lack of feasibility of regulating woodstoves according to the statutory scheme and therefore, suggested an alternative scheme.

At the same negotiation session, the representative of the Consumer Federation of America made a pitch for the regulation to require labels "to present enough information to allow a discriminating purchaser to make the best purchase,"[177] and in the case of woodstoves this meant efficiency information. Supporting documents were distributed describing the Oregon woodstove labeling requirements as well as the consumer information labeling requirements under the Consumer Product Safety Act, the Federal Trade Commission Appliance Efficiency Program, and the EPA Automobile Fuel Economy Labeling Program.[178] The industry association representative objected to such labeling, noting that "this is an EPA, not an FTC, standard and that producing consumer data is not a function of EPA."[179] The Oregon representative, however, stated that Oregon would continue to require efficiency information.[180] Vermont's representative indicated he thought consumer information was important.[181] The Colorado representative agreed and stated that he had letters from the states of Washington and California expressing a desire that the standard include efficiency labeling.[182]

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[173] *See* Proposed Rule, *supra* note 10, at 5015 (to be codified at 40 C.F.R. § 60.530(i).

[174] *See* 42 U.S.C. §§ 7411(a)(2), (4) (1982). *See also supra* notes 126-131 and accompanying text.

[175] *See* EPA Meeting Notes on the Second Session of the Regulatory Negotiation for the Woodstove NSPS (Apr. 17-18, 1986), 14 (Apr. 30, 1986).

[176] *Id.*

Given this alignment, the woodstove manufacturers, which were generally opposed to efficiency labeling, had to reassess their interests. Even though they might be right that such efficiency labeling was not authorized by section 111 or 114, it would benefit them little if states turned around and required efficiency labels, with all the likelihood of different and conflicting standards. Rather, would it not be better to participate in the promulgation of these efficiency labeling requirements in this negotiation, thereby enabling the resulting, single national requirement to be one which the manufacturers could accept? Accordingly, it is not surprising that the proposed rule contains a label requirement providing consumers with efficiency information,[183] a provision which one EPA official described as "one of the more truly negotiated provisions of the standards."[184] It is, however, doubtful that the official reason given in the preamble for the inclusion—that "the committee concluded that [it was] necessary to minimize emissions"[185]—is accurate. The Office of Management and Budget (OMB) is equally skeptical, and pursuant to its authority under the Paperwork Reduction Act,[186] disapproved, as being unauthorized by law, that portion of the proposed rule requiring the temporary labels.[187]

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[177] *Id.* at 11.

[178] *See supra* note 147, at 4.

[179] *See supra* note 175, at 11.

[180] *Id.* at 12.

[181] *Id.*

[182] *Id.*

[183] *See* 40 C.F.R. § 60.536(i) (Proposed Rule, *supra* note 10, at 5021).

[184] *OMB Watch*, MONTHLY REVIEW 7 (July 30, 1987).

The problems of creating a consumer product regulation under the terms of section 111 were surmountable because the players, those with a "stake" in the outcome, could agree for whatever reasons to the regulation. The questionable authority for the regulation does not directly affect them if they all swear to abide by it; this they have done in their formal written agreement not to challenge the proposed rule when it becomes final. Moreover, under their agreement, if the rule is challenged in court by someone else, the parties agree to file memoranda with the court in support of the rule.[188] While this methodology certainly does not eliminate any legal deficiencies in the rule, it does minimize the likelihood that those deficiencies will have legal consequences, such as judicial invalidation of the regulation. Indeed, under these circumstances, the "authority" of the regulation derives more from the agreement between the parties than it does from statutory sources in the Clean Air Act.

In the absence of a regulatory negotiation, it is highly likely that a number of commenters would have objected to the particular method of regulating woodstoves under section 111, if not to the basic concept of their regulation under section 111. Unable to rely on their "inside" ability to achieve a regulation that would meet their substantive objections, commenters would have an interest in raising legal objections to the rule. The negotiation process, however, not only mutes legal objections, it does bring the parties in interest "inside" the substantive rulemaking process. In the case of woodstoves, for example, it meant that manufacturers and environmentalists could negotiate which woodstoves would be regulated at what level according to what timetable.

To industry, the goal was a regulation that would have the least impact on the largest number of manufacturers. This meant a standard which did not set limitations at a level unobtainable by most manufacturers or that would require major changes in their products.[189] Moreover, whatever standard was to be adopted would have to provide enough lead time to minimize disruption of the manufacturing process.[190] To environmentalists, the goal was a regulation that would minimize harmful pollutants as quickly as possible.

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[185] Proposed Rule, *supra* note 10, at 5011.

[186] 44 U.S.C. §§ 3501-3520 (1982).

[187] *OMB Watch*, *supra* note 184, at 5-7.

[188] *See* EPA Negotiating Committee for New Source Performance Standard for Residential Wood Heaters Agreement, (Nov. 7, 1986).

Section 111 describes the level at which emission standards under that section are to be set and also specifies when those standards are to go into effect with respect to new sources. The timing aspect is straightforward; the standard is to apply to any stationary source constructed or modified after the publication of proposed regulations (or, if there are no proposed regulations, final regulations) applicable to that source.[191] There is no provision in the statute for changing the time when the standard will be applicable, and apparently EPA has not altered the timing before.[192] Nevertheless, "inside" the process, the manufacturers were able to negotiate a phased compliance schedule—a two-phase system for manufacturers of most stoves beginning with stoves manufactured after July 1, 1988 and proceeding to a higher standard for stoves manufactured after July 1, 1990.[193] In addition, a special one-year grace period was provided for small manufacturers,[194] and stoves certified to meet the Oregon state standard were grandfathered; that is, stoves meeting the Oregon 1988 standard are deemed to meet the federal 1988 standard, subject to one additional requirement.[195]

In the preamble to the proposed rule, EPA responded to the obvious legal problem in the delayed compliance dates applicable to most manufacturers;[196] it did not bother to address the authority for either the Oregon grandfather or small manufacturer provision.[197] EPA explained that the general requirement for new source performance standards is that they represent the use of Best Demonstrated Technology (BDT), which includes a cost consideration.[198] With respect to woodstoves, EPA stated, there would be a substantial cost if the standard were to apply immediately.[199] Consequently, EPA concluded, "BDT applies only to those classes of new sources that can meet the standards with a reasonable lead time."[200]

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[189] *See, e.g.*, Perry, *Industry vs. Environmentalists*, Wood-N-Energy 65-66 (Mar. 1986).

[190] *See* Keough, *Sins of Emission*, Sierra, Jan./Feb. 1986, at 22, 27.

[191] 42 U.S.C. § 7411(a)(2) (1982).

[192] *See* 40 C.F.R. § 60.1 (1986).

[193] 40 C.F.R. § 60.530 (Proposed Rule, *supra* note 10, at 5014-15).

[194] *Id.*

[195] *See* 40 C.F.R. § 60.530(c) (Proposed Rule, *supra* note 10, at 5014).

[196] *See* Proposed Rule, *supra* note 10, at 5000.

[197] *See id.*

There are at least two problems with this explanation: one legal and one practical. The practical problem is that this explanation for the delayed compliance dates first appears in the preamble to the rule. It does not appear in the Regulatory Impact Analysis, the Issue Paper dealing with compliance dates, or the minutes of negotiations relating to compliance dates. The BDT explanation is another example of EPA's preamble writers inventing an after-the-fact justification that bears no relation to the true basis for the negotiated agreement between the interested parties. As a consequence, there is nothing in the record of the proceeding to support the preamble's bald statement other than general statements that claim giving effect to the statutorily required effective date would be "disruptive to the industry."[201]

The legal problem is that, while BDT does include a cost component, that cost component is to be considered in setting the level or stringency of the standard itself, not the time when the standard will go into effect.[202] That is, if the need to design and produce new woodstoves will take time and, therefore, impose unacceptable costs, then those costs should be considered in deciding whether to set the standard lower, thereby reducing the need to design and produce new woodstoves. There is no authority in the law for EPA merely to delay compliance beyond the statutorily required time in order to mitigate certain manufacturers' costs of compliance with a standard which has been determined to be BDT. Such is the nature of a variance or waiver, neither of which is available to new sources under section 111, except for innovative technological systems of continuous emission reduction, which is not applicable here.[203]

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[198] *See* 42 U.S.C. § 7411(a)(1) (1982).

[199] *See* Proposed Rule, *supra* note 10, at 5000.

[200] *Id.*

[201] *See, e.g.*, RIA, *supra* note 14, at 5-8.

[202] *See, e.g.*, Sierra Club v. Costle, 657 F.2d 298, 330 (D.C. Cir. 1981).

Perhaps even more important than the timing of compliance to manufacturers was the "bottom line," the actual emission limitation to be prescribed. Obviously, a severe limitation could have profound impacts on an industry largely characterized by small manufacturers. On the other hand, a lenient standard would substantially reduce the air quality improvements sought by environmentalists and states.

An initial issue, therefore, was whether there should be different standards for catalytic stoves—stoves with catalytic combusters that operate much the way catalysts in automobiles reduce exhaust pollution—and for non-catalytic stoves. The NRDC was on record as favoring one standard that would force the use of catalysts.[204] The reason was simple; according to every test, stoves designed with catalytic combusters, as a class, emitted significantly less particulates than stoves without them.[205] Because only 60 of the some 200 manufacturers of woodstoves offered models with catalytic combusters, a standard effectively requiring catalysts would have a potentially severe effect on the industry. In Oregon, the level of the standards had been adopted admittedly to reduce the impact on manufacturers, rather than to maximize pollution reduction.[206]

In the negotiation, manufacturers not using catalysts raised questions about the long-term reliability of stoves with catalytic combustors. Their suggestion was that while a new stove with a catalytic combustor may test well, the combustor is likely to degrade significantly over time, making non-catalytic stoves less polluting in the long run. The combustor manufacturers represented on the committee responded with data showing that less than one percent of combustors sold had been returned by customers.[207] Nevertheless, there was other evidence that catalytic combustors could be physically damaged, "poisoned," or rendered virtually inoperative through careless woodstove operation, much as automobile catalysts may be destroyed by the use of leaded gas. Thus, burning cardboard, wrapping paper, or wet wood clogs a catalytic combustor to reduce or eliminate its effectiveness.[208] Moreover, after some period of time, catalytic combustors must be replaced even if the stove has been operated properly.[209]

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[203] *See* 42 U.S.C. § 7411(j) (1982).

[204] *See* Perry, *supra* note 189, at 65, 67.

[205] *See* Radran Corporation, DCN No. 86-231-020-25-10, Emission Control Technologies for Residential Wood Heaters 25-30 (1986) (prepared for Emission Standards & Engineering Div., EPA).

[206] Telephone interview with John Kowalczyk, State of Oregon Dep't of Envtl. Quality, Aug. 28, 1987.

[207] *See* Maviglio, *Troubleshooting Catalytics*, WOOD-N-ENERGY, 30 (Apr. 1986).

The negotiating committee reached the decision to proceed with two separate standards, like Oregon, relatively early. This early resolution and lack of substantial data regarding catalytic combustor degradation suggests that the conclusion was a negotiated compromise rather than compelled by a determination that catalytics and non-catalytics in fact equally reduce pollution over the long term. Again, however, the preamble to the rule suggests otherwise, stating that the decision to set different standards for catalytics and non-catalytics "was based on EPA's *assumption* that even though initial performance differed significantly, the lifetime emissions of the two technologies would be approximately equal."[210] The use of the term "assumption" and EPA's admission that no precise calculation supported this assumption undermine EPA's explanation. Later, EPA in effect admitted that retaining a separate emission standard for non-catalytics was necessary to avoid forcing non-catalytics out of the market.[211] This seems closer to the true explanation for the separate standards.

Ultimately, the proposed rule must contain an emission standard—an emission rate not to be exceeded (in the certification test). The explanation of the derivation of this numerical rate consumes a full page in the Federal Register, with the impression given that the rates were derived through a neutral, scientific process.[212] The Regulatory Impact Analysis, however, states unambiguously that "the stringency of the NSPS in terms of the maximum grams of emissions per hour was negotiated."[213] In other words, the maximum emission rate is not something derived by scientific method, but rather derived through the relative power of the negotiating parties.

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[208] *Id. See also* Proposed Rule, *supra* note 10, at 5006.

[209] *See supra* note 207.

[210] Proposed Rule, *supra* note 10, at 5006 (emphasis added).

[211] *See id.*

[212] *See id.* at 5005-06.

[213] RIA, *supra* note 14, at 1-9.

This is not to say that the scientific information or statistical methods described in the preamble to the proposed rule were irrelevant in the negotiations. To the contrary, data and statistical methods may provide negotiating power to one side or the other. But other matters, such as concessions or agreements on other features of the proposed rule, may also provide negotiating power to one side or the other. Knowing that the numerical limits were "negotiated," rather than determined solely on the basis of the data and methodology described in the preamble, we are left not knowing *what* role the data and methodology played, if any.

The negotiation concluded with consensus. All the parties were in agreement overall. What some had lost at one place, they had won at another. The outcome was acceptable to all. Then, to assure continued allegiance, a formal agreement between all the parties was concluded, requiring each to support the proposed rule and not to challenge the final rule, if it is consistent with the proposed rule.[214] EPA agreed to publish as its proposed rule the proposal adopted by the consensus and to draft a preamble consistent with it.[215] The deed was done.

## V. Regulatory Negotiation and Administrative Law

The above sections of this Article have tried to demonstrate certain problems that exist in EPA's proposed woodstove emission standard and how the regulatory negotiation of this proposal caused or fostered these problems. One response to such a showing, however, is to assert that this particular regulation is idiosyncratic. The fault lies in the dynamics of this particular rule, not in the process of regulatory negotiation generally. Such a response, I believe, would be a mistake, because it is my thesis that the theory and principles of regulatory negotiation are at war with the theory and principles of American administrative law applicable to rulemaking, which Kenneth Culp Davis has described as "one of the greatest inventions of modern government."[216]

Modern American administrative law begins with the New

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[214] EPA Negotiating Committee for New Source Performance Standard for Residential Wood Heaters, Agreement (Nov. 7, 1986).

[215] *Id.*

[216] K. Davis, Administrative Law Text 142 (3d ed. 1972).

Deal, and James Landis provided the best contemporary justification and explanation for the administrative state in his now classic book, The Administrative Process.[217] According to his analysis, Congress creates administrative agencies because modern society requires government regulation to a degree simply beyond the resources and expertise of Congress.[218] These agencies are empowered to make law because they are or will become expert in their fields.[219] Not articulated, but implicit in his analysis, was a belief that these agencies faced problems capable of objective solution, that politically neutral administrators could determine finite and correct answers to the problems of modern industrial society.[220]

Not all shared his optimistic belief in neutral bureaucrats finding objectively verifiable answers to clearly understood problems. The response, however, was not to eliminate the administrative agencies, or even to reduce their powers, but rather it was to subject their actions to procedural restraints and judicial review. The Administrative Procedure Act (APA)[221] was the result, a compromise piece of legislation designed to constrain the discretion of agencies while legitimating their remaining discretion through procedural regularity and judicial oversight. While the APA perhaps reflects a loss of the naive faith in the natural ability of expert bureaucrats to scientifically discover objectively correct solutions to society's problems, it does not indicate a lessened determination to use agencies and rulemaking to solve politically perceived problems. In this, the APA is much like the Constitution; it does not indicate a rejection of the need for strong government for the proper functioning of modern society, but rather a healthy disrespect for the motives and abilities of men placed in power. And like much of the Constitution, the APA uses procedural mechanisms to check the power granted, while not denying the need for the power.

The continuing belief in the importance and legitimacy of agencies as regulators of private conduct, despite a distrust of the regulators, was confirmed by the great period of agency creation during the 1960's and 1970's. Now the focus was more on health and safety regulation, perhaps reflecting a once again naive belief in the existence of scientifically and objectively determinable solutions to problems, but now there was even more concern about the necessity of procedures to constrain the discretion of agencies. Both courts and Congress combined to establish procedures aimed at fostering the rationality of agency decision making.[222] Thus, these procedures, which have come to be known as "hybrid rulemaking," focus on maximizing the information available to the agency, ensuring its critical assessment, and most importantly, requiring that the ultimate decision be objectively reasonable in light of the information obtained.[223] Most recently, the executive branch's contribution has been to require cost/benefit analyses, again to foster rationality in agency decision making.

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[217] J. Landis, The Administrative Process (1938).

[218] *Id.* at 1-16, 46.

[219] *Id.* at 23-24, 45.

[220] *See, e.g.*, Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667-78 (1975).

[221] 5 U.S.C. §§ 551-559 (1982).

Today the emphasis is on deregulation, reflecting a reassessment of whether certain problems exist at all or, if they exist, are best addressed by public law solutions. Nevertheless, where a problem is still perceived to require government action, today's answer to that problem remains agency action. We have come a long way from the simple faith of James Landis, but for the most part we have not rejected his solution where there is agreement as to the need for government action. In place of his faith we have substituted procedural requirements to foster rationality, but we have not abandoned the goal of reasoned decision making to achieve the public interest.

Defining the public interest may be a different undertaking from achieving an agreed-upon public interest. In the Clean Air Act, for instance, a number of provisions, including section 111, requires the weighing of various factors, at least some of which are difficult if not impossible to quantify. The statute implies that this weighing process defines the public interest. In this realm, information and data, logic and science, are only of limited help. Here, values and philosophies may be more pertinent. Yet, here too Congress has delegated to agencies the power to make this definition. As the Supreme Court made clear in *Chevron, U.S.A.*

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[222] *See, e.g.*, 42 U.S.C. § 7607(d) (1982). *See also* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

[223] *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29 (1983).

*v. NRDC*,[224] where Congress has not considered and decided the question at issue in the context of a regulatory scheme, it has implicitly delegated the authority to the agency to make that determination. Accordingly, it would be improper for the courts to second-guess the determination.

Of course, agencies are not to make their determinations in a vacuum. Procedural requirements assure input from interested parties, and recent executive orders institute a supervisory executive branch oversight of executive agencies' determinations. Moreover, this supervisory oversight can properly have a policy component; it need not be politically sterile.[225] Nevertheless, the ultimate responsibility for the determination continues to rest with the agency.[226] Not only is the final responsibility to be the agency's, but in the oft-quoted words of *Scenic Hudson Preservation Conference v. FPC*,[227] an agency's role as representative of the public interest "does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the [agency]."[228]

The concept of regulatory negotiation stands this role on its head, first, by reducing the agency to the level of a mere participant in the formulation of the rule, and second, by essentially denying that the agency has any responsibility beyond giving effect to the consensus achieved by the group. In addition, regulatory negotiation finds its legitimacy in the agreement between the parties, rather than in the determination under law of the public interest; in other words, regulatory negotiation substitutes a private law remedy for a public law remedy.

The recommendations of the Administrative Conference of the United States, based upon Harter's study, state that an agency representative should participate in the negotiation.[229] This is so because the agency has a stake in the outcome. Moreover, its participation should not differ in kind from that of the other parties in interest.[230] In other words, it should bargain and trade its "interests" (the public interest) in the same way the other participants may trade their interests.

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[224] 467 U.S. 837 (1984).

[225] *See, e.g.*, *Motor Vehicle*, 463 U.S. at 59 (Rehnquist, J., concurring). *See also* Sierra Club v. Costle, 657 F.2d 298, 405-06 (D.C. Cir. 1981).

[226] *See* Exec. Order No. 12,291, § 3(f)(3), *reprinted in* 3 C.F.R. § 127 (1981 comp.).

[227] 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

[228] *Id.* at 620.

[229] *See* 1 C.F.R. §§ 305.82-4(i)(8), 305.85-5(1) (1987).

Harter recognizes the possible objection to this role as inconsistent with the concept of the agency as the sovereign decision maker.[231] He responds by suggesting that there is no problem because the agency remains sovereign; it alone makes the final decision.[232] Its representative to the negotiation cannot bind the agency.[233] This response, however, is somewhat disingenuous. As Harter acknowledges, *no* party's representative to the negotiations can bind its principal.[234] Thus, the agency remains like any other participant. The agency's representative must obtain the approval of senior officials in the agency before the agency is committed, just as other representatives must obtain the approval of their principals. However, the fact that the agency's representative is himself supposed to be a senior official[235] makes highly probable that he will reliably be able to speak for the agency. Finally, while Harter is undoubtedly correct that the agency technically has the final decision, this power becomes theoretical at best where the agency has already agreed beforehand along with all the other participants to seek consensus in good faith, to support the consensus result, and in particular to publish as a proposed rule the rule developed by that consensus.[236] In other words, unless an agency acts in bad faith and violates a written undertaking made at the beginning of the negotiation, it is bound to publish the consensus rule as its proposed rule.

That the agency plays no special role in the negotiation is made clear by certain other recommendations of the Administrative Conference. Thus, neutral parties should be sought as "convenors," mediators, or "facilitators."[237] Moreover, "a neutral outside individual" should be appointed, where appropriate, to receive and evaluate confidential data and to report back to the negotiating group.[238]

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[230] *See* 1 C.F.R. § 305.82-4(4)(e) (1987).

[231] *See* Harter, *supra* note 1, at 57 n.316, 64-66.

[232] *See id.* at 65.

[233] *See id. See also* 1 C.F.R. § 305.82-4(4)(g) (1987).

[234] *See* Harter, *supra* note 1, at 64.

[235] *See* Harter, *supra* note 1, at 66. *See also* 1 C.F.R. § 305.82-4(8) (1987).

[236] *See* 1 C.F.R. §§ 305.82-4(11), (13) (1987). *See also* EPA Negotiating Committee for NSPS for Residential Wood Combustion Units, Organizational Protocols (Mar. 20, 1986).

[237] 1 C.F.R. §§ 305.82-4(4), 305.85-5: 5-8 (1987).

This fundamental change in the role of the agency in the rulemaking process is mirrored by the fundamental change in the underlying theoretical justification for the eventual rule. As Harter admits: "Under the traditional hybrid process, the legitimacy of the rule rests on a resolution of complex factual materials and rational extrapolation from those facts, guided by the criteria of the statute. Under regulatory negotiation, however, the regulation's legitimacy would lie in the overall agreement of the parties."[239] Stated another way, the parties to the rule are happy with it; therefore, it matters not whether the rule is rational or lawful. Discretion delegated to the agency by Congress is effectively exercised by the group of interested parties, constrained only by the need to obtain consensus. The law no longer directs or even necessarily constrains the outcome but has become merely a factor in the give-and-take necessary to achieve consensus.

To say that regulatory negotiation turns the traditional concept of administrative rulemaking on its head does not, however, compel the conclusion that it is necessarily unlawful. The Administrative Conference recommendations are carefully crafted in an attempt to comply with all the procedural requirements attendant to rulemaking. The negotiating committees attempt to adhere scrupulously to the requirements of the Federal Advisory Committee Act.[240]

As a consequence, supporters of regulatory negotiation may suggest that "no harm, no foul." That is, if no one complains about a rule developed by regulatory negotiation, it must be deemed a success. For example, Susskind and McMahon, writing in the *Yale Journal on Regulation*, equate the satisfaction of the parties participating in the negotiation with the fairness and wisdom of the rules.[241] And, indeed, to date no rule adopted pursuant to regulatory negotiation has been challenged in court, and there is little reason to think that EPA's woodstove rule would be any different.

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[238] 1 C.F.R. § 305.85-5(8) (1987).

[239] *See* Harter, *supra* note 1, at 99.

[240] 5 U.S.C. app. §§ 1-15 (1982).

[241] Susskind & McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133, 163-64 (1985).

Reliance on the absence of disagreement as evidence of legitimacy for a regulation puts a premium on assuring that the negotiating group adequately represents all affected interests. There are, however, both practical and theoretical limitations on the number of interests that may be represented and the quality of representation each interest may obtain. Where the interest is strong enough to make itself known and felt, little difficulty arises—either that interest will be represented in the negotiation or the negotiation in the end will not likely be successful. More problematic is where the interest is not well defined, organized, or strong. Reliance on the Federal Advisory Committee Act's requirement for "balanced membership" on advisory groups is not sufficient.[242] First, unlike ordinary advisory committees, where the agency is not a member and the output is truly only a recommendation, the regulatory negotiation committees are advisory only in name. Thus, the agency's responsibility for determining the public interest, expressed in the Federal Advisory Committee Act,[243] no longer provides the safeguard otherwise available for unrepresented interests. Second, while a general "balance" may be achievable in the committee setting, such balance is not itself sufficient to assure the representation of unrepresented persons or interests. For example, in the woodstove negotiation, the Consumer Federation of America (CFA) was supposed to represent the interests of the consumer, but consumers, as the CFA would be the first to admit, are hardly a homogenous entity. The CFA may have represented the interests associated with the mentality of a *Consumers Reports* reader, but it did not appear to lobby on behalf of poor, rural folk for whom the rule will provide little benefit and perhaps significant burden. Moreover, the fact that these people do not comment on the proposed rule or challenge a final rule in court hardly establishes that the rule is fair and wise as to them.

The tendency of alternative dispute resolution to focus on the interests of the specific parties to the dispute without regard to broader values has been noted in the literature related to alternatives to litigation.[244] As Judge Edwards has noted, there are important differences between alternative dispute resolution where only private interests and values are at stake and where public values and interests are involved.[245] "[I]f ADR is extended to resolve difficult issues of constitutional or public law—making use of nonlegal values to resolve important social issues or allowing those the law seeks to regulate to delimit public rights and duties—there is real reason for concern."[246] Regulatory negotiation, by reducing disputes over what is in the public interest to disputes between various private interests, and by substituting private agreement for public determinations made according to legal norms, transforms administrative rulemaking into an area of private law, and this is a fundamental alteration.

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[242] *See* 5 U.S.C. app. § 5(b)(2) (1982).
[243] *See* 5 U.S.C. app. § 9(b) (1982).

These theoretical and practical differences between regulatory negotiation and traditional rulemaking can explain how EPA's development of its proposed rule on woodstove emissions was not idiosyncratic. They suggest that the regulatory negotiation process submerged public interest values, as reflected in the terms and conditions of the statute, to the special interests of the parties involved in the negotiation. Therefore, it is hardly surprising that what emerged from that process is a proposed rule with which the parties are happy but which bears scant resemblance to what was contemplated by the statute.

## VI. CONCLUSION

The thesis of this Article has been that the regulatory negotiation process tends to subvert the principles and values of administrative rulemaking. This Article has attempted to demonstrate evidence of this as it occurred in the EPA woodstove emission proposed rule. If successful, this Article should give pause to some at least who would otherwise view regulatory negotiation as totally beneficial and benign, in light of the glowing reports of regulatory negotiation pleasing all the parties, avoiding litigation, and producing wiser and fairer regulations. However, it is not the purpose of this Article to conclude that regulatory negotiation is necessarily bad and should be shot dead in its tracks. To the contrary, the practical benefits of regulatory negotiation cannot be gainsaid, and if they have not received much attention here, it is only because there are ample other sources.[247] It is of no small moment when the professional defenders of the environment, the affected industry, and government entities can achieve consensus on how to deal with a particular source of pollution. Rather, it is the purpose of this Article to demonstrate that regulatory negotiation, despite the fact that it can probably be accomplished without violating existing procedural requirements, fundamentally alters the dynamics of traditional administrative rulemaking from a search for the public interest, however imperfect that search may be, to a search for a consensus among private parties representing particular interests.

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[244] *See, e.g.*, Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984). *See also* Merry, *Book Review: Disputing Without Culture*, 100 HARV. L. REV. 2057 (1987).

[245] *See* Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 671-72, 676-77 (1986).

[246] *Id.* at 676.

Only after one recognizes this fundamental change can one fully assess the advantages and disadvantages of regulatory negotiation as an alternative to traditional administrative rulemaking. Up to now, the debate over regulatory negotiation has revolved around its feasibility and methods to improve its "success" rate.[248] Now, however, the debate should include the appropriateness of private interests determining the public values at stake in the rulemaking. In some cases the issues to be decided in the negotiation may be so bounded that any threat to public values disappears. In other cases the negotiation may claim as its subject matter issues which properly should be decided only by an agency.

The above discussion has proceeded upon the assumption that the regulations to be adopted are intended to serve the "public interest." It is, I believe, the assumption that presently does underlie administrative rulemaking. Despite *Carter v. Carter Coal Co.*,[249] which after all has been completely discredited on its commerce clause conclusions,[250] it is doubtful whether Congress is forbidden to delegate legislative powers to private entities. It has clearly granted such powers to states in the Assimilative Crimes

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[247] *See* authorities cited *supra* note 9.

[248] *See* authorities cited *supra* note 9.

[249] *See supra* note 7.

[250] *See, e.g.*, United States v. Darby, 312 U.S. 100, 119-24 (1941).

Act,[251] and it has allowed private parties to control whether federal programs would go into effect.[252] Both schemes have been upheld as not involving unconstitutional delegations of legislative authority.[253] Thus, assuming there would be no absolute bar to congressional delegation of legislative powers to private entities, there should be no absolute bar to empowering explicitly private parties to adopt regulations through regulatory negotiation. Legislation authorizing such action, and presumably establishing safeguards and procedures which might resemble the Administrative Conference's recommendations with respect to regulatory negotiation,[254] would not rely on an independent determination of the public interest as the legitimation for the regulation; rather, it would rely on the legitimation of consensus among those with a stake in the regulation. Such legislation would also implicitly reject public law remedies for private law remedies, a rejection that has been advocated by some commentators.[255] Framed in this manner, such legislation would likely be very controversial because it would focus attention on the implied bankruptcy of both public law remedies and traditional administrative rulemaking, attention that has been missing thus far in the debate on regulatory negotiation. Nevertheless, before Congress or others endorse regulatory negotiation because of its perceived benefits, they should at least be aware of the full effect and implications of their actions. Only in this way can the real debate between regulatory negotiation and traditional rulemaking be joined.

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[251] *See* 18 U.S.C. § 13 (1982).

[252] *See, e.g.*, 7 U.S.C. § 1336 (1982).

[253] *See* United States v. Sharpnack, 355 U.S. 286 (1958); United States v. MacMullen, 262 F.2d 499 (2d Cir. 1958).

[254] *See supra* note 8.

[255] *See, e.g.*, Huffman, *Trusting the Public Interest to Judges*, 63 DEN. U.L. REV. 565 (1986).

# Regulatory Negotiation: *A Real World Experience*

by Neil Eisner*

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## INTRODUCTION

In June 1983, the U.S. Department of Transportation (DOT), through one of its operating administrations, the Federal Aviation Administration (FAA), sat down with representatives of all the interested parties and began to negotiate a new rule. This was the first time the Federal government tried this process,[1] which is known as regulatory negotiation; although the process is not yet completed, the results are already quite promising. The purpose of this article is to explain why DOT decided to try regulatory negotiation, how it has proceeded, and what it has learned.

## BACKGROUND

### *The Need for Regulatory Negotiation*

The increasing complexity and formality surrounding the informal rulemaking process of the Administrative Procedure Act (APA)[2] can make it difficult for an agency to develop a sound regulatory solution to some problems. The existing process often leads to adversarial relationships among the participants. Some participants take extreme positions, withhold information from one another, or attack the legitimacy of opposing positions. In addition, publishing a notice of proposed rulemaking (NPRM) or some other notice and asking for public comment, in accordance with the APA, does not generally permit the give-and-take that is sometimes necessary to develop a workable solution. Public comments are often focused on finding problems with the proposals rather than offering suggestions that help develop creative solutions.

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Because of problems such as these, efforts have been made to develop more effective processes to produce better quality rules. One suggested approach involves the use of regulatory negotiation.

### *The Administrative Conference Recommendation*

In 1982, based on a detailed report prepared by a consultant, Philip J. Harter (hereinafter: "the Harter report"),[3] the Administrative Conference of the United States (ACUS)[4] found that:

> Experience indicates that if the parties in interest were to work together to negotiate the text of a proposed rule, they might be able in some circumstances to identify the major issues, gauge their importance to the respective parties, identify the information and data necessary to resolve the issues, and develop a rule that is acceptable to the respective interests, all within the contours of the substantive statute.[5]

As a result, ACUS recommended that Federal agencies consider regulatory negotiation for appropriate rulemaking. To initiate this process, ACUS recommended that the agency assemble a group of representatives (generally, not more than 15) of each interest that would be affected by the rulemaking, including an agency representative. (It is important to note that each affected interest should be represented, not each affected organization or individual.) The group's objective is to reach consensus on a resolution of the issues and to prepare a proposed regulation for consideration by the agency head. If the agency head agrees to this proposed regulation, it then would be published for public comment in accordance with the APA. After the public comment period closes, the group would meet again to discuss the comments and determine whether any modifications should be made to the proposed rule as a result of those comments. The group would then submit its recommendation for a final rule to the head of the agency, who would decide whether to adopt it.[6]

***"The group's objective is to reach consensus on a resolution of the issues and to prepare a proposed regulation for consideration by the agency head."***

### *The Department of Transportation Rulemaking*

The FAA is required by statute[7] to prescribe reasonable rules and regulations governing, in the interest of safety, the maximum hours or periods of service for pilots and other employees of air carriers. An important portion of the rules the FAA issued in response to this statute are commonly referred to as the FAA's flight and duty time rules.[8] These rules have remained essentially unchanged for approximately 30 years, despite major changes in airline equipment and operating practices. This and the rules' lack of clarity have caused many disputes between the air carriers and their employees.[9] The FAA has also been involved in litigation over the meaning and enforcement of portions of the rules and has had to issue over 1,000 pages of interpretations.[10]

In an effort to clarify and update the rules, the FAA issued a number of NPRMs,[11] but each effort raised significant objections, and the FAA has been unable to promulgate a final rule.[12] This experience convinced DOT that the time had come for a new approach.

## THE BENEFITS OF REGULATORY NEGOTIATION

### *General Benefits*

The benefits to be gained through regulatory negotiation are covered in great detail in the Harter report. This article will only briefly touch upon the important benefits that DOT determined were applicable to its rulemaking:

- The process should be less adversarial. Rather than confronting the parties with a government-sponsored solution that they might feel compelled to attack, the parties would confront what they believe to be a problem and, in a more informal setting, would be able to propose and discuss their own solutions.
- The process could lead to creative solutions. All those with ideas on how to solve the problem—not just the government agency—would be sitting around the table.
- It would be to everyone's advantage—and the process should be conducive to this—to work out a solution acceptable to all. This is especially so if, in the absence of consensus, it appeared that the agency might choose an alternative that could cause problems for many, if not all, of the participants.
- If there is general consensus on the resolution, there also should be less likelihood of judicial or congressional intervention.
- With consensus, the rule should also be more easily enforceable.
- Even without consensus, the issues should be more clearly defined and the differences may even be narrowed substantially. This should make it more likely that any final rule issued by the agency would be better; it should be more acceptable to the parties than a rule the agency may have issued without the benefit of regulatory negotiation. The value of this benefit cannot be overempha-

sized; it appears that almost all, if not all, of the parties to the flight and duty time negotiation believe that the process has been a success since the first day of negotiations, because they believe that the FAA has learned so much from the discussions and the defining and narrowing of the issues.[13]

- Because of the representation of each affected interest, it should be easier for the agency to gather the necessary factual support for its rulemaking. To the extent that consensus is reached, it may not be necessary for the agency to develop as detailed a factual record as would otherwise be required.
- Participation in the process would let everyone see how difficult it is to draft a rule, especially on a controversial subject. Even if the parties did not reach a consensus, they would be less likely to attack a rule issued by the agency. Indeed, if the parties could not reach a consensus, it would be difficult for them to complain that they could do a better job than the agency.

### *Benefits For The Particular Rulemaking*

In examining the flight and duty time rulemaking, DOT believed that there were a number of factors that made it particularly appropriate for the application of regulatory negotiation:

- The agency had already been unsuccessful in a number of efforts to amend the existing rule. The process of publishing a notice and seeking public comment simply had not been working.
- The agency head was publicly committed to issue another NPRM in the near future.[14] Thus, the parties knew that if they were unable to reach a consensus, the agency planned to try again on its own.
- There were areas of compromise; the different sides had things they could give up to maximize their benefits. Although this is a safety rule, such compromises are possible, as long as the necessary overall level of safety is achieved. To ensure that this necessary level is attained in any compromise is one of the reasons why the agency must be a party to the proceedings. Safety may be important to other parties, but the agency is statutorily responsible for it and must make its position clear.
- Because the issues involved also often affected airline labor-management negotiations, some of the potential parties to the proceedings were organizations that were used to negotiating with each other. We thought that this type of experience would be valuable, especially since this was the first time that regulatory negotiation was to be tried.
- The interests affected were generally well-organized and the selection of parties was, therefore, expected to be noncontentious.
- The potential parties had a great deal of experience in dealing with the agency under the APA. This, we believed, would cause them to recognize the advantages of regulatory negotiation and foster good faith efforts to make the new process work.

## LEGAL REQUIREMENTS

### *General*

There are three major legal requirements that affect the use of regulatory negotiation: (1) the Federal Advisory Committee Act (FACA);[15] (2) the agency's statutory authority for issuing the regulation, and (3) the APA.

### *The Federal Advisory Committee Act (FACA)*

FACA requires that, if an agency is going to meet with more than one individual on more than one occasion for the purpose of receiving advice or recommendations, this group must be chartered as a Federal advisory committee. The chartering process requires specific clearances from different government organizations. All meetings of the group must be open to the public, unless special conditions are met, and minutes of the meetings must be kept.

> ***"The agency must be an active participant in the proceedings to ensure that the recommended rule will meet its statutory responsibility . . . "***

### *The Agency's Statutory Authority*

The agency must be an active participant in the proceedings to ensure that the recommended rule will meet its statutory responsibility, will be within its statutory authority and can be easily enforced by the agency. For example, the other parties may readily agree to a rule that would replace a reporting requirement with a subtantially increased burden on the agency to have its inspectors perform constant surveillance of an industry.

It must be stressed that, since the agency cannot delegate its statutory responsibility to the committee, it cannot guarantee that it will issue a consensus document. The most that the agency can promise is that it will issue the proposed or final rule if it is not inconsistent with the agency's statutory authority or other statutory requirements.

### *The Administrative Procedure Act*

No matter how representative the regulatory negotiation committee may be and no matter how successfully the process may work, the agency still must comply with the APA requirements to publish an NPRM, provide an opportunity for public comment, and consider the comments received before issuing a final rule. However, if the negotiation process is successful and the negotiating group was representative, there should be very few, if any, comments during the public comment period and those received should not raise many serious problems.

The Department of Transportation decided that it was also important to involve the general public in the creation of the regulatory negotiation committee. As a result, as described in more detail in the next section, DOT published a notice in the *Federal Register* proposing to establish the committee and asked for public comment. Later, the public was advised of the creation of the committee and its first meeting. In addition, the agency is keeping a full record of the negotiation process for its public rulemaking docket. This record includes minutes of the meetings and copies of Committee reports.

## THE NECESSARY STEPS

### *The Internal Decision*

The first time an agency considers regulatory negotiation, the initial step involves not only a decision on whether to proceed but, also, a thorough education process. The latter involves imparting a very clear understanding of what the negotiation process involves and how it can be advantageous to the agency; it also requires making very clear what the responsibilities of the agency are. The agency representative, for example, must recognize that the purpose of the process is to negotiate, not simply to gather information. Some may view the process as simply another form of a preliminary, informal public hearing.

There may be concern within the agency over whether the process will delay the rulemaking. There is no question that another step is added, but the offsetting benefits must be stressed. For example, after regulatory negotiation, the agency may be able to publish an NPRM with a shorter comment period than would normally be provided (many exceed the minimum required), and it should receive fewer and less critical comments, to which it can more easily and quickly respond. In addition, to the extent differences are narrowed or consensus is reached, the agency will save a great deal of time and expense in the long run because there will be less likelihood of litigation challenging the rule and the rule will be more easily enforced.

During this initial phase, the agency must determine whether regulatory negotiation is feasible and appropriate for the particular rulemaking. This involves consideration of such things as whether the issues are, in fact, negotiable, whether the interests affected by the issues are readily identifiable, and whether effective representatives of these interests can be chosen. The factors to be considered are covered in much greater detail in the Harter report.

The agency must also determine whether the subject matter warrants a professional mediator or whether someone else, from either inside or outside the agency, can act as a convenor/facilitator of the meetings. The mediator or facilitator/convenor should be selected as quickly as possible so that he or she can play a role in the initial decisionmaking as well as in the next stages. There were three reasons why DOT decided to use a professional mediator in the flight and duty time regulatory negotiation. First, the issues were quite controversial. Second, some of the parties represented either labor or management groups; in this regard, we thought that a mediator would be especially able to facilitate consensus. Finally, because this was the first time the process was being tried in the Federal government, we believed that it was worthwhile to have a professional mediator.

### *The Preliminary Discussions with Potential Parties*

If the agency decides to proceed, it should then have preliminary talks with the potential parties to determine whether they believe the process is feasible for the particular rulemaking. Depending on the issues involved and the relationship between a party and the agency, preliminary contacts with a potential party by the mediator or facilitator/convenor (rather than the agency) may produce greater candor. The process must be clearly explained to the parties; they must fully understand what their commitment will be. An organization, for example, must understand that its representative cannot take every issue back to its membership for a vote and that it may defeat the process if its representative presents the position of the organization and says changes cannot be negotiated.

### *The Establishment of an Advisory Committee*

After going through the first two steps and determining that regulatory negotiation was both appropriate and feasible, DOT published a notice in the *Federal Register* advising the public that it was considering forming an advisory committee for regulatory negotiation.[16] The notice provided the background of the particular rulemaking, a discussion of the concept of regulatory negotiation, and explained why DOT found regulatory negotiation an appropriate technique to apply to this rulemaking. The notice then set forth the procedures and guidelines that would apply to the process, described the major issues that would be considered during the negotiation, listed the interests DOT thought were affected, and identified the parties that should be part of the negotiation. The parties included a "public/consumer" representative in addition to various types of aircraft operators, flight crewmember groups, and the FAA.

The notice also provided a tentative schedule for completion of the process and indicated what would happen if the advisory committee failed to agree. These last two items are important, especially when there is no statutory or judicial deadline. There must be a time constraint as one incentive to reach an agreement, especially if delay may be in the interest of one of the parties. In this regard, the notice said that the committee would be dissolved if it did not reach agreement by a set date and that earlier dissolution would occur if the mediator or the agency believed that it would be impossible to meet the deadline due to lack of sufficient progress.

The notice asked for comment on the interests, the parties, the issues, the procedures, and whether regulatory negotiation was appropriate for the particular rulemaking.

Two real issues were raised during the comment period, but there was no serious controversy. One issue involved who the parties should be. The other involved the concern of one party that the flight and duty time issue was not appropriate for regulatory negotiation. That party, however, agreed to participate. After making a final selection of parties, DOT issued a charter creating the Federal Advisory Committee. It also published a document in the *Federal Register*, which responded to the public comments on the notice, indicated that the Department was establishing the Committee, and provided a list of the parties.[17]

The extra steps that DOT took to involve the general public—public notice, an opportunity for public comment, and a record of the negotiations—improve the likelihood that the process will be successful. These steps, for example, make it more likely that the agency will choose a representative group. Additionally, the process will be less susceptible to legal challenge since everything was done in an open and public manner.

### *The Regulatory Negotiations*

The first meeting was set for June 29, 1983, and the Committee met approximately every other week for two to three days through the middle of August. It also established subgroups that worked between full Committee meetings and prepared reports on particular subjects. By consensus (including the FAA), the Committee decided to extend their deadline and meet in September because the parties thought they could further narrow differences.

At the Committee's request, FAA staff then drafted an NPRM, including a preamble, which was submitted to the Committee for review. At a meeting in February 1984, the Committee agreed to recommend the issuance of the NPRM for public comment, even though there was some disagreement on the contents. The NPRM was published on March 28, 1984,[18] and had a comment period of 45 days. (Past proposals in this area had longer comment periods; one allowed 120 days, with an additional reply period of 30 days.[19]) Most, if not all, of the parties would agree that the public comments were fewer and less contentious than those received on past proposals on this subject. Subsequent to the close of the comment period, FAA staff circulated the comments to the Committee members (and will circulate summaries of those comments when they are completed) and arranged a meeting for September 1984 to develop a final recommendation for the Administrator.

It is worth noting that one factor causing delay in the process was the time necessary to schedule meetings. Because of the diverse membership on the Committee, meetings had to be set up well in advance. To avoid undue delays, it may be better to anticipate events and schedule meetings as soon as possible. For example, an agency should anticipate how long it will take to summarize public comments and schedule the meeting to review the comments before the comment period even closes, rather than after the comments are summarized.

From the very beginning, DOT believed that the negotiations were valuable. The discussions were informative, a better understanding of the problems was developed on all sides, consensus was achieved on some issues, and differences were narrowed on others. The other parties to the proceeding also acknowledged that the process was worthwhile.[20] That is not to say that there were no problems and that the process could not work better. The purpose of the next section is to discuss some of the problems—and potential solutions—that the Department anticipated, or encountered, during its experience with regulatory negotiation.

> ***"The discussions were informative, a better understanding of the problems was developed on all sides, consensus was achieved on some issues, and differences were narrowed on others."***

## POTENTIAL PROBLEM AREAS

### *The Mediator or Facilitator/Convenor*

Choosing a person to chair the negotiations can be difficult. Objectivity and neutrality are important so that all parties will recognize a serious effort is being made to reach a fair solution, but it is also important that the chairperson have sufficient expertise to be able to understand what is going on—not only to understand the discussions but also to appreciate why parties may be taking certain positions. Some knowledge can be obtained prior to the proceedings, but it will be difficult to find a person who will have sufficient expertise without any "bias."

In some matters, obtaining an individual who will be perceived of as objective and who will have sufficient expertise may require hiring someone from outside the government. This may result in substantial costs. In many instances, however, the parties should be able to reach consensus without professional or third-party guidance; in those cases, simply bringing in an agency employee, who is not directly involved in the rulemaking, to chair the proceedings should suffice.

### *Administrative Support*

The agency must provide the necessary meeting rooms and administrative support. The facilities have to accommodate the members of the committee and the public, and they should include a place for private meetings between members and their staff or among individual members. The administrative support will vary depending on the issues involved. For example, because the scheduling of airline crews is complex, the regulatory language can also be quite complex. As a result, the agency provided drafting, typing and copying assistance so that oral proposals made at the negotiating table could be quickly converted to a draft rule for review by the Committee.

### *Costs*

Conducting a regulatory negotiation can be expensive. Although, in a properly chosen rulemaking, the cost of conducting the negotiations should be more than offset by the long-term savings of successful negotiation, the agency may either be reluctant to spend short-term money for the *possibility* of long-term gains or may simply be unable to fund the particular project at that time.

The other parties also can have substantial expenses for such things as salaries, travel, lodging, research, and professional and clerical support. For example, the nature of the issues and the need to conduct research between meetings may necessitate numerous, brief meetings rather than a few week-long meetings. This can increase travel costs tremendously.

Regardless of any arguments that can be made about long-term savings, the agency must carefully consider the costs associated with any of its actions. This is especially important where the participants have limited resources, such as may be the case with consumer or public interest groups. In this regard, agencies may be asked to consider funding the participants. The Department of Transportation (as are some other Federal agencies) is precluded from offering funding for public participation in its rulemaking by its Appropriations Act.[21] Although DOT believed that it could provide funding for expenses under the Federal Advisory Committee Act, it decided that to do so in the first regulatory negotiation proceedings would be inappropriate.

Regulatory negotiation offers numerous benefits to both the agency and the public, and DOT did not want anyone to be able to argue that it was being used to avoid restrictions on the funding of public participation in rulemaking.

### *Representatives*

Selecting representatives could prove to be one of the most difficult issues involved in regulatory negotiation. Three basic concerns are: (1) whether a particular party adequately represents an interest and is capable of negotiating in good faith for that interest; (2) whom to choose among equally qualified representatives; and (3) whether the particular individual who will be the representative has both the technical expertise and the negotiating skills that are necessary.

The initial decision is who should represent a particular interest. For example, with an industry such as aviation, one issue is whether individual airlines should be selected as representatives of the industry or whether an organization representing most or all members of the industry would be more appropriate. Choosing an organization that represents an entire industry may initially appear to be logical. However, if the organization has little power to act without constantly consulting or even polling its members on particular issues, it may be ineffective at the negotiating table. Moreover, if the members of the organization have conflicting views, it may be difficult for the organization to be a representative. Indeed, individual members of the organization who represent the different or conflicting interests might be more representative.

Choosing among equally qualified representatives also may be difficult. For example, there are a large number of airlines that would be affected by the flight and duty time regulations. No one airline may necessarily be more representative than another. The agency must use its best judgment, but in some instances a random selection may be the only possibility.

The final concern involves the skills of the representative. The individual with the necessary technical expertise to represent the interest in the negotiations may not have the necessary negotiating skills. This may be one of the most important obstacles to the successful completion of a regulatory negotiation. In selecting an individual to be its representative, each organization—including the agency—must recognize the importance of negotiating skills; those involved in setting up a regulatory negotiation committee must continue to look for steps that can be taken to ensure that the representatives will have some skill in this area. (The fact that a party has negotiating experience in such areas as labor-management or litigation does not necessarily mean that an individual with the experience will be designated by the party to participate in the regulatory negotiation.) The Environmental Protection Agency conducted a one-day training course on negotiating prior to the initiation of its negotiations to help alleviate this problem. It is not clear, though, how much such a course will help. Another possibility to consider is to use a skilled negotiator who is generally familiar with the subject. Others with more technical expertise could then be provided to assist the negotiator. However, oftentimes those with the expertise also have the responsibility for the rulemaking and will be unwilling to surrender it to someone else. In the long term, though, if regulatory negotiation proves successful, and agencies use it more and more, many of the same individuals should be returning to the negotiating table and will be developing increased negotiating skills; this should lessen the problem.

It must be stressed that only one person should represent or speak for a party. This is especially true for the agency. If it is not clear who the "real" representative is, this may confuse the negotiations and lead the parties to question the likelihood of any proposal being accepted by the agency head. To further ensure the objectivity of the process, the mediator or facilitator/convenor should conduct the negotiating sessions as independently from the agency as possible.

### *Federal Advisory Committee Act*

FACA can inhibit the negotiating process. Because the meetings are open to the public, the parties cannot be as open or candid as they might otherwise be. Disputes may also arise over the minutes that must be taken. In this regard, the agency should make it very clear at the beginning of the proceedings what the legal requirements are under FACA and then attempt to reach a consensus on what type of minutes will be kept within those legal constraints. In its recommendations, ACUS noted that more flexibility was necessary and suggested that Congress should grant agencies authority to waive FACA.[22] Legislation has been introduced in Congress that would accomplish this.[23]

### *Consensus*

The Department initially anticipated a problem defining "consensus" and decided that this should be left to the Committee for resolution. Generally, consensus means that each interest concurs in the result. Whether this requires unanimity or a majority of the representatives of each interest was not established in the agency *Federal Register* notices. The Committee never took a position on the issue. In many instances, the mediator simply stated that it appeared there was consensus on a particular point and it was time to go on to the next issue; no one objected. These negotiations moved smoothly in this way, but in other negotiations it may be necessary at the outset to determine what consensus will be.

It is also interesting to note that the parties were generally reluctant to "sign off" on any end product, even where there was consensus. Where the agency believed that it had support for a particular position, it did not believe that it was necessary to insist on formal, public acknowledgment of that support. It is not clear whether this will happen frequently in regulatory negotiations nor what its impact will be on the later stages of the rulemaking process. It is not, however, uncommon to have this kind of situation in rulemaking. Organizations with diverse memberships will, for example, recognize the benefits of a proposed rule and not "fight" it, but they do not publicly support it because of pockets of opposition in the organization or some formal position the organization has taken.

> ***"Consensus is the ultimate objective, but the value of the learning process and the inevitable narrowing of some differences as a result of that learning process should never be underestimated."***

### *The Agency Position*

It is possible that the negotiating process could work well without the agency. The other interested parties could reach an agreement acceptable to the agency. (In the past, private parties have worked out their differences and submitted joint rulemaking recommendations to an agency.[24]) For maximum benefits, however, the agency should participate. It does not have to put its position forward first for everyone else to comment on. Indeed, it may even wish to avoid this action because it is too much like publishing an NPRM, but the agency should always be ready and willing to put its position on the table. Even when it is not presenting a position, the agency, because of its expertise, should be ready to ask the questions that can help clarify the issues and bring parties closer together. If the agency has a problem with a proposal, it should say so. Without this clarity, the parties' efforts will be wasted and they may be reluctant to participate in future negotiations. When appropriate, the agency should make a proposal for resolving a particular issue. If one major group or party is at point A, another is at point C, and the agency proposes E, the parties may all agree; or they may agree, with the agency's consensus, that they would be better off at B. The agency proposal may offer the necessary encouragement to get them there.

### *Legal Issues*

The agency should have an attorney available at the negotiations. The agency attorney frequently may be turned to for advice about the requirements of FACA, the APA, other statutes, regulations, and similar matters. Having an attorney readily available will allow the negotiations to progress smoothly.

## CONCLUSION

Even though the Department of Transportation's negotiations on flight and duty time have not been concluded, they have already provided substantial benefits. If the parties—including the agency—recognize the consensus on all issues is not necessary for the process to be successful, then regulatory negotiation is much more likely to be accepted. Consensus is the ultimate objective, but the value of the learning process and the inevitable narrowing of some differences as a result of that learning process should never be underestimated.

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## FOOTNOTES

[1] Two other Federal agencies have subsequently begun regulatory negotiation projects: the Environmental Protection Agency and the Occupational Safety and Health Administration.

[2] 5 U.S.C. §553.

[3] Mr. Harter's report was turned into a law review article: "Negotiating Regulations: A Cure for Malaise," 71 Geo. L.J. 1 (1982).

[4] ACUS is a permanent, independent, governmental organization. Its purpose is to develop improvements in the legal procedures by which Federal agencies administer regulatory, benefit and other government programs. Its membership consists of both governmental and nongovernmental individuals.

[5] ACUS Recommendation 82-4, "Procedures for Negotiating Proposed Regulations," 1 C.F.R. §305.82-4 (1984).

[6] *Id.*

[7] 49 U.S.C. §1421(a)(5).

[8] 14 C.F.R. §§121.470-471, 121.480-493, 121.500-.525, and 135.261 (1983).

[9] *See* 48 Fed. Reg. 21339, 21340 (1983).

[10] *Id.*

[11] 42 Fed. Reg. 43490 (1977); 43 Fed. Reg. 8070 (1978); and 47 Fed. Reg. 10748 (1982). *See* 48 Fed. Reg. 21339, 21340, for a brief description of the rulemaking history.

[12] 46 Fed Reg. 32413 (1981) and 47 Fed. Reg. 51585 (1982).

[13] *See, e.g.*, "Participants See Value in Reg-Neg's First Flight," Legal Times, October 10, 1983, at 2.

[14] *See, e.g.*, 47 Fed. Reg. 51585 (1982).

[15] 5 U.S.C. App.I.

[16] 48 Fed. Reg. 21339 (1983). For an example of another notice of intent to establish a regulatory negotiation advisory committee, *see* EPA's notice: 49 Fed. Reg.. 17576 (1984); *see, also*, 48 Fed. Reg. 7494 (1983).

[17] 48 Fed. Reg. 29771 (1983). EPA's notice establishing its committee can be found at 49 Fed. Reg. 22408 (1984).

[18] 49 Fed. Reg. 12136 (1984).

[19] 47 Fed. Reg. 10748 (1982).

[20] *See supra* note 13.

[21] Department of Transportation Appropriations Act, Pub. L. No. 97-369, §315 (1982) and Pub. L. No. 98-78, §308 (1983).

[22] 1 C.F.R. §305-82-4, Recommendation 2 (1984).

[23] E.g., S.1823, 98th Cong., 1st Sess. (1983).

[24] *See, e.g.*, 47 Fed. Reg. 36792 (1982).

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# Breaking Down Walls:

## Negotiated Rulemaking at EPA

Daniel J. Fiorino and Chris Kirtz

Early in 1983, the Environmental Protection Agency (EPA or the Agency) announced that it would initiate a pilot project to test negotiation as a supplemental technique for developing proposed rules.[1] Several considerations prompted the EPA to undertake this effort. The Administrative Conference of the United States (ACUS) had recently issued a report assessing the potential of negotiation and recommending its application to rulemaking.[2] Second, although primarily used in site- or issue-specific disputes rather than for general rulemaking, negotiation had come to be regarded as an acceptable and frequently successful form of environmental problem-solving.[3] Finally, and perhaps most importantly, people within the EPA were becoming more aware of the limits of conventional, adversarial rulemaking under the Administrative Procedure Act.[4] The standard rulemaking process had become too susceptible to delay and litigation. As many as 80 percent of EPA's final rules are challenged—often by both sides of an issue.[5] A pilot program on regulatory negotiation offered an opportunity to test an alternative method for proposing Agency rules that would permit all participants a face-to-face role in decision-making. Parties with different interests can attempt to resolve issues by sharing information, generating alternatives, identifying areas of agreement and disagreement, and problem solving to reach a mutually satisfying result.

After a two-year process of consultation with various constituencies, analysis of legal and other issues, and a false start or two, EPA's project[6] has yielded two largely successful negotiations. The first dealt with nonconformance penalties (NCPs) under Section 206(g) of the Clean Air Act (CAA).[7] The second addressed criteria and exemptions for emergency pesticide handling under Section 18 of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).[8] In each case, the negotiating committee reached a consensus that EPA issued as or used as the basis for a formal Notice of Proposed Rulemaking (NPRM). Based on exit interviews completed so far, nearly all of the participants in the negotiations concluded that the process worked better and yielded more

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The opinions of the authors are their own and do not necessarily reflect the official policy of the United States Environmental Protection Agency.

[1] Notice of Intent, 48 Fed. Reg. 7494-7495 (Feb. 22, 1983).

[2] Administrative Conference of the United States, *see* ACUS Recommendation 82-4 (1984), "Procedures for Negotiating Proposed Regulations," 1 CFR 305.82-4 (1984).

[3] G. BINGHAM, RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE, (1985). Bingham, a senior associate at the Conservation Foundation cites more than 160 examples of the use of mediation or negotiation to resolve environmental disputes. Another recent application of negotiation for developing a general rule involved the Federal Aviation Administration's flight safety rules. This project is discussed in Eisner, *Regulatory Negotiation: A Real World Experience*, 31 FEDERAL BAR NEWS AND JOURNAL 371-376 (November 1984). *See also* Harter, Negotiating Regulations: A Cure for the Malaise? 71 GEO. L. R. 1 (1982).

[4] 5 U.S.C. §551-559 (1976). EPA normally uses "informal notice and comment" procedures to develop regulations. EPA solicits information from interested and affected parties, develops policy, publishes a proposed rule and invites public comment.

[5] Address by Wm. Ruckelshaus, former EPA Administrator, Second National Conference on Environmental Dispute Resolution (Oct. 1, 1984) (available from the Conservation Foundation in "Selected Speeches" of that conference).

[6] The Regulation Management Staff of the EPA Office of Policy, Planning and Evaluation designed the negotiation project. The Office manages the project and provides financial, logistical and administrative support. The first two completed negotiations by EPA were regarded as demonstration projects from which general conclusions on the usefulness of the process could be drawn.

[7] 42 U.S.C. 7525(g) (1976 and Supp. v 1981).

[8] 7 U.S.C. §§136-136y (1982).

acceptable regulations than they might have expected under conventional rulemaking. In addition, participants pointed to improved understanding of technical issues, fuller appreciation of the institutional positions of the other parties, and an awareness of the potential for negotiation as an alternative to the standard method of rulemaking. Both negotiations were completed on schedule, with results that the Agency considered more than satisfactory.

This paper describes important aspects of this pilot negotiation project.[9] Our purpose is to present EPA's approach, experience, and tentative conclusions so that others can draw on what we have learned for further applications of negotiated rulemaking.

The paper is organized into the following sections:

- a discussion of the principal design issues EPA faced early in the project, including legal and financial constraints
- a description and analysis of the pilot negotiations—one establishing Nonconformance Penalties under the Clean Air Act, and the second establishing criteria and procedures for emergency exemptions for the use of pesticides
- a discussion of the participants' perceptions of the negotiations, followed by general statements on negotiation as a supplement to standard rulemaking.

## DESIGN ISSUES AND CONSTRAINTS

The EPA had several objectives in testing the innovative process of rulemaking by negotiation: 1) to determine which types of regulations were best suited for negotiated rulemaking; 2) to develop procedures and criteria to foster effective negotiations, and 3) to study the effectiveness of this technique in the context of environmental regulation.[10] In order to meet these objectives a variety of sensitive design issues, administrative matters and policy considerations needed to be addressed at the outset of the project.

**Structure of the project.** Regulatory negotiation could not replace mandatory rulemaking procedures under the Administrative Procedures Act but could be used to supplement this process. Even if one theoretically could bring all afffected parties together to negotiate a rule, there would be substantial legal as well as political risk in bypassing formal notice and comment procedures. EPA planned to use structured negotiations only to produce a proposed rule and thereafter to proceed as it would in any other rulemaking. The assumption, of course, was that public comment on a negotiated rule would largely verify the acceptability and soundness of the consensus-based proposal. Thus, the preparation of the final rule would largely consist of fine-tuning the language in the proposed text. The negotiating committee's formal role would end with the presentation of the proposal.

The structure of the project was determined in large part by the decision to operate under the Federal Advisory Committee Act of 1976 (FACA).[11] FACA requires Federal agencies to formally charter a group when it meets periodically at the Agency's request to provide advice or recommendations which an agency intends to use.[12] The General Services Administration (GSA) administers FACA[13] and has issued interpretive guidelines on its applications.[14] The head of the agency must assert that the committee's purpose and proposed operations are consistent with the guidelines, and the agency must obtain GSA approval for the charter, along with the concurrence of the Office of Management and Budget. The charter itself must describe the purpose, functions, and composition of the committee with regard to what segments of the population will be represented.[15] It also must give the estimated cost of the committee, including whether or not there will be any compensation for members, and indicate a termination date.[16] FACA committees must conform to several procedural rules, including *Federal Register* publication of announcements of all committee meetings[17] and public access to the minutes of each committee meeting.[18] In addition, FACA requires that committee meetings themselves be open to the public.[19]

At first, FACA appeared to be an obstacle that the Agency might want to work around rather than with. In fact, there was little choice but to comply with FACA, to accept the administrative and time burdens it would impose, and to structure the negotiations according to its procedural constraints. In practice, after the initial steps required to obtain charter approvals, FACA was less of a constraint than it had first seemed. In many ways its procedural requirements may even have enhanced the legitimacy of the negotiations.

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[9] The Harvard Negotiation Project documented the two negotiations. We are indebted to Dr. Lawrence Susskind of the Harvard Negotiation Project and to the contractor, ERM-McGlennon, for their observations and insights.

[10] Nonconformance Penalty Negotiated Rulemaking Advisory Committee, Charter §4, (1984); Pesticide Emergency Exemption Negotiated Rulemaking Advisory Committee, Charter §4 (1984). *Supra* FN 1.

[11] 5 U.S.C. app. §§1-15 (1976 & Supp. 1982).

[12] *Id.*, §2.

[13] Exec. Order No. 12024, 42 FR. 61445 (1977), *reprinted* in 5 U.S.C. §1 app. at 979-80 (1982).

[14] Interim Guidelines, 48 Fed. Reg. 19324-19331 (Apr. 28, 1983).

[15] 5 U.S.C. app. §9c (1976 and Supp. 1982).

[16] *Id.*, §9c (G), (I).

[17] *Id.*, §9a2.

[18] *Id.*, §10c.

[19] *Id.*, §10a.

The negotiating committees chartered under FACA were to play more than a mere advisory role in the development of rules. The committees explicitly sought to produce a consensus policy document. The EPA Administrator agreed to use the committee's products as the basis of the NPRMs, barring any inconsistency with the Agency's statutory responsibilities.[20] This commitment was incorporated into the written protocols adopted by the two committees.

**Agency participation.** A second important design issue was the extent to which the Agency could play a role in the negotiation process in addition to its role as a substantive party-at-interest. There are two such process roles in the EPA's regulatory negotiations model—convenor and facilitator.

As the title implies, the convenor assists in initially structuring the negotiations rather than managing the negotiation process itself. By means of the conflict assessment, which precedes the first substantive negotiation meetings, the convenor helps EPA assess both the suitability of a rule for negotiation and the willingness of the necessary range of parties to participate.

The facilitator functions as a neutral process manager during the negotiations. The facilitator's task is to support the parties in defining and analyzing issues and to move the group toward a consensus on those issues. This includes, for example chairing committee meetings, providing staff support for the committee's activities, and advising the group collectively and individually on process issues.

EPA's view from the start was that the convenor's position should always be filled by an outside party. However, EPA's project managers wanted an Agency staff person to play the facilitator role in at least one of the two pilot negotiations to see if the Agency could serve as an "honest broker" while simultaneously representing its substantive interests. For the first negotiation, EPA retained a private firm with experience in environmental mediation to serve as convenor and facilitator.[21] In the pesticides exemption negotiation, an Agency employee was designated as facilitator,[22] although the firm from the first negotiation still served as convenor. In both negotiations, a senior official from the lead EPA program office represented the Agency's substantive interests.[23] The successful conclusion of the pesticide exemption negotiation demonstrated the feasibility of EPA staff serving as facilitator, although an outside party will continue to serve as convenor.

**Selecting the rules to be negotiated.** The process for evaluating and ultimately selecting a regulation for negotiations occurred in three stages:

1. Matching the candidate rule against the selection criteria;
2. For rules that met the criteria, determining the willingness of the lead EPA program office to commit to negotiations;
3. Conducting a more in-depth conflict assessment of rules that met the first two tests.

EPA first solicited public recommendations of candidate rules in a February 22, 1983 *Federal Register* notice.[24] In addition, the convenor contacted sixty-six environmental groups, trade associations, and other organizations. Some fifty rules were nominated as negotiation candidates through this process, and these were the subject of preliminary screening against the selection criteria. Most, however, failed to meet the criteria, and they were excluded from further consideration.[25]

For the limited number of rules not eliminated at this stage, the convenor next assessed the interest of the responsible EPA program office. If

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[20] This commitment was set out in the NCP and Section 18 Pesticide Handling *Federal Register* Notices of Intent, 49 Fed. Reg. 17576-17578 (1984) and 49 Fed. Reg. 31145-31147 (1984) respectively.

[21] John McGlennon of ERM-McGlennon and his staff were selected by the Agency as the covenor/facilitator. They also served as the convenor in the second negotiation. As convenor they solicited and evaluated rule candidates, contacted potential parties, and advised on whether a particular issue was negotiable. The facilitator served as "process manager" for the negotiating committee, but was not invested with any decision-making authority or responsibility.

[22] LaJuana Wilcher, of the Agency's office of General Counsel.

[23] Representing the Agency in the NCP's negotiation was Charles Freed, Director of the Manufacturers Operations Division, in the Office of Mobile Sources. In the pesticides negotiation Stephen Schatzow, Director of the Office of Pesticide Programs represented the Agency. EPA also has a lawyer from the Office of General Counsel and a staff analyst from the Office of Policy, Planning and Evaluation on hand to serve as "elbow advisors." EPA program staff were also usually present.

[24] 48 Fed. Reg. 7494-7495 (1983).

[25] Candidate rules had to meet the following basic criteria—

1. Rules had to be in a "middle range" of development, neither near to final promulation or years from initial proposal. Rules excluded for "timing" reasons included:
   - Water Quality Standards
   - CERCLA Reportable Quantities
   - TSCA Rules for Confidential Business Information
2. Rules could not involve too many parties or issues. Regulations affecting a large number of groups or depending on complex, unsettled questions of science were rejected:
   - TSCA Rules for Inadvertant Production of PCBs
   - RCRA Financial Responsibility Rules
   - CERCLA Definition of "clean" Reclaimed Hazardous Waste Sites
3. Rules representing distinct regulations were favored over generic "groups" of rules or policy issues. Candidates rejected for this reason included:
   - National Emission Standards for Hazardous Air Pollutants
   - New Source Performance Standards
   - TSCA 6 Rules Authorizing EPA to Take Action Against Specific Chemicals

there was initial interest, the convenor interviewed program staff further to solicit information on interest groups that should be represented, issues, the possible scope of the negotiations, and draft operating protocols.

Candidate rules meeting these first two tests were the subject of a broader conflict assessment. The convenor initiated this phase by sending a letter to parties identified as potential participants. The letter described the purpose, goals, and design of the project, outlined the procedures for conducting the negotiations, and provided background information on the candidate rule.

The convenor ultimately spoke with all parties suggested by either EPA or others to determine interest in negotiating a particular rule. The convenor asked each organization to ensure that a representative authorized to represent its interests would be a participant. Once these interviews were complete the convenor made a recommendation to the Project Director on whether to proceed with a rule to a final assessment phase. A *Federal Register* notice was published after each assessment process to outline EPA's intention to negotiate specific rules.[26] The notice included a rationale for the selection of the rule, identified potential parties and issues, and invited the public to comment on any aspect of the EPA negotiation plan.

The importance of this process was demonstrated when Standards for Low-level Radioactive Waste was suggested as a candidate. The rule met the general criteria, and the convenor conducted an in-depth conflict assessment. Initial reactions from industry and state and local contacts were positive. The Nuclear Regulatory Commission (NRC) and the Department of Energy (DOE) were key stakeholders in any program involving radioactive waste, so their participation was essential. Both entities agreed to participate since they knew (1) the rulemaking would affect their operations, and (2) if negotiations were held, they wanted a voice in any decision-making. The initial response from environmentalists was mixed, but there seemed to be sufficient interest to suggest they would participate.

As the conflict assessment proceeded, however, major reservations from the environmental groups and the NRC emerged. Environmentalists were concerned, first, about whether one or two environmental groups could effectively represent the environmental community on this issue. They also doubted that their resources were sufficient to participate effectively on a rule of this scope and complexity. Third, environmentalists were concerned about the highly controversial data that would be at issue. The NRC was apprehensive about any EPA actions that could slow down state efforts to develop disposal sites. In light of these concerns, EPA decided to drop the rule from further consideration for negotiation.

Thus, the conflict assessment served an important function. The project managers were able to draw lessons about the suitability of rules for negotiation and about the need to understand the kinds of issues stakeholders considered negotiable.

The first two rules selected for negotiation by this process were non-conformance penalties under §206g of the Clean Air Act and emergency exemptions for pesticide use under §18 of FIFRA. These rules were selected because they met the selection criteria and diverse groups of parties were ready, willing and able to negotiate in good faith to reach a consensus. Issues were limited in scope and supported by sufficient data. Before each negotiation began, there was a negotiating meeting in which participants met to review the rule, issues, and protocols in more detail.

**Resource pool and party compensation.** A major constraint on the process was the extent of resources available to support the negotiating committees. EPA assumed from the outset that the committees should have access to some sort of "resource pool" to enhance their analytical and conceptual capabilities. Conflicting factual assertions could arise that would need third-party verification; the committee could require expert advice on a variety of methodological or technical questions; negotiators might reach an impasse that an outsider with a fresh conceptual approach could resolve. Early in the project, the Agency set as a target the availability of up to $50,000 as a resource pool for negotiation, one-half of which would be EPA funds and the other half private funds raised for this purpose. Individual parties could, through an approval procedure established by the committee, draw upon the resource pool for technical or other support services. In addition, the Agency recognized that certain parties would require payment of travel expenses if they were to participate. Although there could be restrictions on the use of Federal funds for this purpose, there would be no problems with drawing on the private portion of the pool.

The relatively straightforward decision to establish a resource pool generated interesting administrative and legal issues. To administer the pool, EPA decided to use a neutral, third-party broker to remove direct control of this element of the project from the hands of the project managers and the facilitators. The Agency arranged with the American Arbitration Association to administer the resource pool in the first negotiation and with the National Institute for Dispute Resolution to do so in the second. Development of specific procedures for drawing on the pool were left to the two negotiating committees as part of the written protocols they would adopt to structure their proceedings.

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[26] 49 Fed. Reg. 17576-17579 (1984), 49 Fed. Reg. 31145-31148 (1984).

An issue related to resources is EPA's decision not to compensate parties for their time devoted to committee or work-group sessions or for time to prepare for these sessions. Based on policy and legal concerns, a prohibition on compensation was included in both committees' charters[27] and adopted by the committees in their protocols. Certain parties continue to assert the need for compensation to permit participation in future negotiations. This issue remains unresolved.

**Committee protocols.** A final issue was determining a protocol or a set of ground rules for the negotiations. As with any unfamiliar process, there were a number of procedural questions that had to be settled before the committees could proceed on the substantive issues: How would "consensus" be defined? What if new parties asked to be added after the negotiations had begun, or others already on the committee decided to withdraw? What implications would participation or statements made by participants have on any future legal proceedings?

Final decisions on protocols were left to the committee participants' sense of what was necessary and appropriate. However, EPA prepared draft protocols for the committees' consideration. For example, it was proposed that no party would be barred from litigation later by virtue of its participation in a negotiation. Parties would be able to withdraw at any time, without prejudice. In general, the proceedings should be as flexible as possible to promote effective negotiations. Each group of participants revised its respective draft protocol presented by EPA, modifying the procedures to fit the particular needs of the committee.

The next section of the paper outlines how the issues described above were treated in the context of the two negotiations.

### Nonconformance Penalties

**Background.** Nonconformance penalties (NCPs)[28] initially were recommended as a subject for negotiation by an environmental group consulted by EPA. Because environmental groups must be more selective about the rules to which they can commit resources for negotiations, this was an important signal of a group's interest. The NCP rule met the EPA's general criteria for negotiability. It was at an early stage of development, so EPA's program was not locked into a specific approach. The issues were manageable, in terms of scope and complexity, with no major gaps or uncertainties that would preclude resolution. The parties-at-interest were identifiable, and the initial conflict resolution showed that a sufficient number were prepared to participate in good-faith negotiations.

Moreover, there was general interest among all the parties in developing a proposed rule as soon as possible. EPA needed to comply with a statutory requirement and was well along in actual standard-setting for heavy-duty engines, with the NCPs an important component of those standards. Environmental interests saw the NCPs as an important auxiliary to technology-forcing standards, allowing non-conforming engines to be produced while still prodding manufacturers to meet the standards. Industry representatives had a number of incentives to participate. At some point they would need to meet EPA's emission standards, so they wanted NCPs in place as an alternative should the technology requirements prove difficult initially. This was especially important to small manufacturers, who would not be in a position to achieve the technological progress as quickly as the large manufacturers. Industry representatives also saw the negotiations as an opportunity to ensure that the NCPs would be equitable and not place any manufacturer at a competitive advantage.

**Composition of the negotiating committee.** The convenor's conflict assessment began well in advance of EPA's April 24, 1984 *Federal Register* notice announcing its intent to form the NCP's negotiating committee.[29] By this time EPA had already identified twenty participants through the process of general notice, written or telephone contacts with likely participants, and meetings to confirm an individual party's commitment to negotiate. In fact, the composition of the final negotiating committee was virtually identical to this list published for comment. The eventual twenty-two participants included the following interests: firms manufacturing heavy-duty engines (12); industry associations (5); state government air quality agencies and an association of such agencies (3); EPA and a representative of a national environmental organization. The make-up of the committee did not change in the course of the negotiations.[30]

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[27] Nonconformance Penalty Negotiated Rule Making Advisory Committee, Charter §5 (1984); Pesticide Emergency Exemption Negotiated Rulemaking Advisory Committee, Charter §5 (1984).

[28] EPA developed the Nonconformance Penalties rule under the authority of Section 206(g)(1) of the Clean Air Act. The purpose of the NCP's rule is to provide temporary relief for manufacturers of heavy-duty trucks or vehicles who initially lack the capability to meet the air quality standard. Manufacturers will be allowed to certify, produce, and sell nonconforming engines provided they pay the appropriate penalty. The penalty is intended to cost the manufacturer of a nonconforming vehicle or engine at least as much as compliance with the standard would have, as well as create a disincentive for future noncompliance.

[29] 49 Fed. Reg. 17576-17579 (1984).

**Issue resolution and use of working groups.** The committee members agreed on ten issues for resolution and grouped them into three categories—Application of NCPs, Penalty Structure and Rate-Setting, and Administration and Enforcement. The committee established a working group to address each category.

The working groups were the primary forum for developing issues and proposing options for the full committee's consideration. Between the first and second full negotiating sessions, volunteers from the working groups agreed to prepare discussion papers on each of the ten issues. These discussion papers were the focus of the first two rounds of work-group meetings, and they served as a basis for reaching consensus on an issue or at least narrowing areas of disagreement. The strengths of the initial work-group sessions were in the thorough preparation by the participants, particularly those who drafted the discussion papers, and the effective sharing of information. The weakness was the limited progress made toward resolution of issues, particularly for the Applications group, which had five of the ten principal issues on its agenda.

By the second full negotiating meeting, certain core issues had emerged. The design of the penalty rate structure was one such issue; another was whether or not NCPs could or should apply to recalled vehicles. On the first issue, the problem was how to assess the effects of alternative penalty formulae on manufacturers. The second issue was primarily a legal one, and there were complaints about EPA not clarifying this issue earlier. There was also concern about the inadequate use of a discussion paper prepared by manufacturers. By the end of the next-to-last full negotiating session, the facilitator pressed the parties to reach consensus, noting that most of the original list of ten issues were still unresolved.

Near the end, the work of the Penalty Formula group intensified. It held both an evening and early morning session in advance of the last full committee meeting in mid-October. To assess the cost of alternative penalty formulae, two participants developed a spread sheet program that helped eliminate many of the uncertainties that had been blocking consensus.

The final full committee meeting was also intense. Negotiating sessions among various groups of participants were held just before this meeting. These meetings focused on the three remaining unresolved issues—certification of nonconforming engines, availability of NCPs, and administration of NCPs. There was consensus on each of the other seven.

**Closure.** Because there was no agreement on the actual language of a consensus document after the last negotiating session, the committee had to establish a process for reaching closure on a final document. They established a working group to reach agreement on remaining issues and regulatory language. The group included one representative from each of four groups of parties—manufacturers, EPA, state agencies, and environmentalists. Over the next three weeks this group reviewed and discussed a consensus statement prepared by the facilitator, based on agreements from the last meeting. This led to circulation of a revised consensus statement among the work group and two conference calls devoted to a paragraph-by-paragraph review. In mid-November, a final consensus statement was distributed by mail to the full committee. By late December, all participants had signed the consensus document,[31] although many had attached comments or conditions. It was agreed that because everyone had signed the consensus document, any remaining comments could be raised during the public comment period.

The NPRM for Nonconformance Penalties was published in the *Federal Register* on March 6, 1985.[32]

### Emergency Exemptions for Pesticides

**Background.** An environmental group initially suggested § 18 of FIFRA for negotiation. Section

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[30] Membership on this Committee included representatives of the American Trucking Association, State and Territorial Air Pollution Program Administrators, the Manufacturers Emission Controls Association, the Cummins Engine Company, Ford Motor Company, Onan Corporation, Volvo, Colorado Department of Health, General Motors, the Automobile Importers of America, Inc., Caterpillar Tractor Company, Isuzu Motors America, Mercedes-Benz Truck Company, Inc., International Harvester, California Air Resources Board, National Resources Defense Council, EPA, Iveco Trucks of North America, Mack Trucks, Inc., Chrysler Corporation, the Motor Vehicle Manufacturers Association, and the Engine Manufacturers Association.

[31]. Environmental Protection Agency, Nonconformance Penalty Negotiating Committee, Consensus Statement (Nov 16, 1984).

[32]. 50 Fed. Reg 9204 (1985) All comments were from participants, and all were supportive. Final rule published August 30, 1985 50 Fed. Reg. 35374 (1985)

18 permits the Administrator to exempt federal or state agencies from compliance with the Act under emergency conditions. Original regulations issued in 1973 attempted to implement a process for review of requests under section 18.[33] Internal EPA analysis indicated in 1982 that the original system was not effectively screening exemption requests. Environmentalists were interested because of their concern that emergency exemptions had been granted too liberally in the past. More specifically, they suspected that the exemption process was being used as an alternative to the standard registration process for authorizing pesticide use. EPA had similar concerns.

The Agency wanted to respond to concerns raised in an internal audit and to a Congressional report on inadequacies in the exemption procedures and criteria.[34] The industry position on the issue was that the rules were not in need of revision. However, the initial conflict assessment revealed that if EPA were firmly committed to revising the rule then industry would participate in a negotiation process.

From the environmentalist perspective, the rule was an appealing candidate for negotiation not only because its revision was high on their agenda, but because it met the criterion as a "mid-level implementation rule." That is to say, it covered matters of definition, such as "significant economic loss" and "cost of production"; procedure and timing, such as public notice requirements and how to disseminate use information to producers; and evaluative criteria for such matters as risk or residue chemical concerns. However, it did not involve setting health-based standards nor depend on especially controversial data or assumptions.

The responsible EPA program staff initially were concerned about the additional time it could take to develop a proposed rule by means of an untested process. However, the program management recognized an opportunity to work constructively with affected interests in a way that would let them openly share in the burden and responsibility of drafting the rule. After the convenor and project staff assured the program managers that the negotiations could be completed within a four-month time frame, the program staff agreed to participate in the negotiations.

**The negotiating committee.** Compared to the NCP committee, this committee included a larger, more diverse range of interested parties. Given EPA's interest in demonstrating the feasibility and value of negotiated rulemaking, this diversity provided a fuller test of the process.

The conflict assessment proceeded much as it had for the NCP's negotiation. The initial effort to identify a broad range of interested parties produced contacts with over 120 potential parties. Based on these contacts, the convenor was able to narrow the likely participants to progressively smaller numbers. As parties realized that others with similar positions would be participating, they deferred to those parties to represent their interests. Potential participants received information kits describing the substantive issues and the process to be used. Positive responses were followed up with in-depth telephone discussions or personal interviews, until solid commitments were received from what clearly was a representative group of parties. As a final check, the August 3, 1984 *Federal Register* notice invited applications from any parties who could argue that they would represent an interest not covered by the preliminary list of participants.[35] In this notice, EPA also announced an informal organizational meeting open to any interested party.

The final list of twenty-one participants fell into five groups. First were the environmental groups: The Defenders of Wildlife, The National Audubon Society, The National Wildlife Federation, and The National Coalition Against the Misuse of Pesticides. State health or pesticides control officials and state agricultural officials comprised the second grouping.[36] Their interests differed, however, because of their separate objectives. State health officials were concerned about health effects, especially given the dramatic increase in exemptions granted in recent years. The state agriculture people had to respond to their organizational and constituency interests, primarily farmers. The state agricultural agencies also had a direct interest, as they make the formal requests for emergency exemptions. The third and largest group included representatives of pesticide user groups.[37] They had a direct economic stake in the outcome. Fourth were representatives of manufacturers and processors.[38] Fifth were Federal agencies, specifically EPA and the Department of Agriculture (USDA). USDA was particularly concerned that this rule be consistent with its related program regulations and statutes. EPA also invited participation by representatives of the Senate and House Agricultural Committees. Representatives of Interregional Research Project No. 4 (IR-4) completed the participant list.

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[33] 40 C F R §166 (1973)

[34] *EPA Pesticide Regulatory Program Study: Hearings Before the House Subcommittee on Department Operations, Research and Foreign Agriculture of the Committee on Agriculture*, 97th Congress , 2d Sess (1982).

[35] 49 Fed. Reg. 31145-31148 (1984)

[36] National Association of State Departments of Agriculture, Association of State and Territorial Health Officials, Association of American Pesticide Control Officials, State FIFRA Issues Research Group

[37] National Cotton Council, Florida Citrus Mutual, Pesticide Users Advisory Committee, American Farm Bureau Federation, National Association of Wheat Growers, National Cattleman's Association, National Corn Growers Association, American Seed Trade Association

[38] National Food Processors Association, National Agricultural Chemical Association.

**Issue resolution and the role of working groups.** The EPA program office proposed an initial list of issues that was discussed with participants during the conflict assessment process. The *Federal Register* notice announcing the negotiation and the formation of the advisory committee also listed these issues.[39] At the organizational meeting in August, the committee discussed and refined the proposal, divided the list of seventeen issues into three categories, and established a working group to focus on each category. The Emergency Definitions working group was assigned such key terms as "emergency," "significant economic loss," and "pesticides outbreak." A second working group addressed health and safety considerations. The third working group, on implementation, considered issues of procedure, timing, and notification, including a time frame for EPA's review and how to disseminate use information to producers and the public. As in the NCP's working groups, membership in these groups was determined by request of the participants.

The working groups were not empowered to resolve or dispose of issues; their task was to develop the issues, share information and perspectives relevant to the issue, clarify positions, narrow the range of disagreement, draft suggested language, if possible, and report to the full committee. The committee's goal was to draft the proposed text of the rule. The full committee discussed draft language and referred it back to either the working group or a subpart of the group to reconsider topics still at issue. As it turned out, the two most critical issues in the negotiation were defining the terms "emergency" and "significant economic loss." The committee dealt with especially difficult issues by assigning tasks to ad hoc working groups (often a part of the standing work group) to develop and recommend language. For example, at the third full session the committee established a working group to propose final language on economic loss and related issues.

**Closure.** Like the first negotiation, this one proved the maxim that 90 percent of the progress in a negotiation takes place in the last 10 percent of the available time. Evening and early morning working group sessions preceded the full committee's session, and there were intense negotiations on specific issues in both the working group and full sessions.

An important difference between the two negotiations was in the form of closure. The NCP's committee reached agreement on the penalty formula and key concepts relating to its application. These agreements served, as the protocols prescribed, as the basis for the NPRM that EPA would draft. In contrast, the pesticides committee had set as its objective drafting the actual text of the regulation and the preamble. Thus, the last session of the committee consisted of a detailed review of final text, with the consensus on each item incorporated into the final text as it emerged from the committee. Participants signed the final draft in that last committee meeting, literally within minutes of the closure deadline the EPA representative had set. The consensus document even stated that the signers agreed to support the preamble and the regulatory language.[40] The Emergency Exemptions NPRM appeared in the April 8, 1985 *Federal Register*.[41] The delay between the committee consensus and *Federal Register* publication was due to statutorily-required reviews by the Department of Agriculture, the House and Senate Agriculture Committees, and EPA's FIFRA Science Advisory Panel.

## OBSERVATIONS ON THE NEGOTIATION PROCESS

To evaluate the two negotiations, EPA's documentor conducted interviews with participants before the negotiations began, and then again after each committee completed its work. These interviews provide a basis for some general observations on regulatory negotiation.

**Nonconformance penalty negotiation.** In pre-negotiation interviews, the participants' principal reservations or concerns were with the negotiation process itself rather than with substantive policy issues. Time constraints were a major concern, both with regard to the time allotted to produce a proposed rule and the time demands on individual participants. Representatives of small manufacturers understandably had reservations about holding their positions against large manufacturers. There was also apprehension about the extent of EPA's commitment to the process, as well as a perceived lack of flexibility under the

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[39] 49 Fed. Reg. 31147 (1984).

[40] Environmental Protection Agency, Pesticide Exemption Negotiating Committee, Consensus Statement (Jan. 16, 1985).

[41] 50 Fed. Reg. 13944-59 (Apr. 8, 1985) (to be codified at 40 C.F.R. Part 166).

Clean Air Act to accommodate a negotiated rule. Manufacturers and trade association representatives were concerned that negotiations would collapse if the single environmental party withdrew from the NCP process. The environmental representative was apprehensive about the dynamics within a group so heavily weighted with manufacturing interests, but also recognized the power he held as an indispensable party.

The primary reason the manufacturers agreed to participate in the first negotiation was a strong dissatisfaction with the standard notice and comment rulemaking process. One representative was quoted as saying, "Almost anything would be better than the confrontation process we have now." More specifically, manufacturers' representatives saw negotiation as a way to influence a rule in its formative stages, before the formal Agency position was developed in an NPRM. They also saw possible longer-term benefits, in the form of more constructive, less adversarial relationships with other participants. Other reasons for their participation were reduced costs (especially if they could avoid litigation), a more balanced and technically sounder rule, and the perception that if negotiations were going to occur they had no choice but to be part of them.

The manufacturers perceived themselves as a heterogeneous group with different interests. The most marked difference was that between the large and small manufacturers. The smaller manufacturers thought the larger firms and EPA were in by far the superior position in terms of expertise and resources. However, the emphasis on consensus was seen as an important element in offsetting this imbalance. Concern that confidential data might be revealed in this negotiation was not a problem, because the rule under consideration was of a general nature. However, there was concern that confidentiality could be a problem in negotiating other rules in light of FACA's public meeting requirements.

Interviews conducted with participants after the negotiations concluded provide some interesting comparisons. Most reported, for example, that the experience had confirmed their original reasons for participating. They concluded, almost unanimously, that negotiation had produced a better rule than the standard rulemaking process would have. They were enthusiastic about the process as well, commenting on the group's commitment, effective participation, and on the absence of the posturing and antagonism characteristic of the standard process. Their principal reservations were about the substantial time commitment that had been required, the need for earlier and more active involvement by EPA's technical people, and the lack of a greater diversity in representation of non-manufacturing interests. Confidentiality had not been a problem, but participants reiterated that it could be with a rule involving proprietary information.

**Pesticide exemption negotiation.** Pre-negotiation interviews with participants in the pesticides negotiation revealed motivations and concerns similar to those expressed by NCP committee members. Representatives were motivated to participate by their very strong impression that EPA was committed to revising the emergency exemption rule. The Congressional report,[42] EPA's internal audit, and various other actions clearly had signaled the need for change. Potential parties had to decide whether to participate and have an opportunity to influence the rule in negotiations, or to deal with what would emerge from the standard notice and comment rulemaking process. That indeed was the choice, because if a sufficiently representative group could not have been formed, EPA would not have proceeded with the negotiations and would have developed the rule in the standard fashion.

Although parties interested in the pesticide exemption agreed to participate, it was not without reservations. A primary concern was that the process was largely untested. Participants saw this as an important rule, presenting substantial issues. A diverse array of parties with differing and perhaps irreconcilable interests would need to negotiate in good faith. Many were skeptical about the capacity of the process to yield even a conceptual framework for a proposal rule, let alone the actual regulatory language. There also were reservations about EPA's commitment to issue the committee's product as a proposed rule without notification.

In the interviews conducted after the negotiations, participants reported unanimously that the process and the product had exceeded their expectations. The outcome was more than acceptable, and they were surprised that consensus was reached on the text of a preamble and a proposed rule. They noted some weaknesses. One was an observation that some participants did not represent their organizations' interests as strongly as they might have. This, of course, is a perception, and there certainly are different ways for parties to define and assert their interests. Another observation was that there were a number of technical issues the committee could have addressed but did not. In the view of some participants, considering these issues could have added substantively to the quality of the outcome.

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[42] *See supra* note 34.

**Observations on the EPA experience.** Based on EPA's experience to date, we offer the following observations about the uses of regulatory negotiation.

1. *Among the constituencies affected by regulatory negotiation, business interests provided strong support.* In the two completed negotiations, interest from manufacturers and trade associations was strong. This constituency was very willing to try negotiation as a way to resolve policy issues. They had fewer "non-negotiables" in approaching the process, and they saw the process as a method of arriving at a substantively superior outcome.

2. *Interest groups in general are willing to commit the time and resources necessary for an effective negotiation.* Most of the participants in the two negotiations commented on the amount of time and effort it required. Most thought it was worthwhile, but agreed that a commitment to a negotiation should not be made lightly. What impressed the participants, however, was that the potential benefits made a commitment of time and resources worthwhile.

3. *Except in limited cases, confidentiality of information may be a concern but not a major problem.* This issue did not come up at all in the pesticides exemption negotiations. It was a concern in the NCP's negotiation, but the only time it was cited as a constraint was in the availability of cost data in calculating the effects of alternative penalty formulas. Manufacturers were reluctant to share too much cost data with competitors and with EPA. One reason was that too much sharing of production and cost data might have been inconsistent with antitrust restraints imposed on the major manufacturers. Thus, rules involving a great deal of proprietary or trade secret data might not be appropriate for negotiation. The conflict assessment stage of the process should be where this issue is evaluated.

4. *The procedural requirements of FACA do not unduly obstruct the regulatory negotiation process.* The only qualification to this statement could be on the issue of compensation, assuming agencies decide as a matter of policy to compensate certain parties. As interpreted by the GSA in its guidelines, FACA may limit who can be compensated under a FACA charter and under what circumstances. This issue is still under analysis. However, FACA's other requirements—public notice, open meetings, and the need for a committee charter—posed no obstacles in the two negotiations. In fact, EPA went further than FACA required. One could argue that by providing a public framework for the negotiations, FACA's requirements helped ensure the legitimacy of the process and the confidence of the participants.

5. *Negotiation will be a useful supplement to conventional rulemaking, but only where participation by representatives of all affected interests is secured.* Any issue worth negotiating must draw upon a broad representation of affected interests if it is to produce a sound and defensible rule. Omitting one set of substantial interests leaves open the possibility of litigation or other challenge, and that of course would undermine the negotiation process itself. A major purpose of the conflict assessment is to determine the willingness of a sufficiently representative group of parties to participate. If an agency cannot obtain commitments from representatives of all key interests, even after an effort to educate and persuade, then it had best find another subject for negotiation.

## CONCLUSION

Based on EPA's experience so far, regulatory negotiation appears to be a useful complement to standard notice-and-comment rulemaking. Despite the demands on their time, the participants found it to be a constructive experience, with benefits extending beyond the rules themselves. EPA achieved regulations that reflected a consensus of the affected parties, and thus the Agency can expect less opposition as it proceeds with promulgation and implementation. Several of the potential administrative and legal issues were less formidable than they originally appeared.

Yet EPA's experience also offers a number of lessons on the limits of regulatory negotiation, at least at this early stage of developing the concept. Certain kinds of regulations are not appropriate for negotiation, for reasons of content, complexity and scope of issues, or the perspectives of potential participants. The EPA experience also emphasizes the importance of the preliminary assessment of a rule's suitability for negotiation and, following that, of careful groundwork leading to the actual, substantive negotiation. Indeed, the preparation and events preceding the negotiations appear to be as important as the negotiations themselves in achieving a successful outcome.

# Regulatory Negotiation as a Policy Process

**Daniel J. Fiorino,** U.S. Environmental Protection Agency

Regulatory negotiation is a process of policy formulation that brings representatives of affected interests together to reach consensus on the content and sometimes the language of a proposed rulemaking. Its use in environmental policy reflects a trend toward resolving controversies through consultation, mediation, and negotiation rather than through litigation or other forms of institutional confrontation. In *Resolving Environmental Disputes,* Gail Bingham documents the steady expansion in the use of consensus-based techniques, from a handful between 1974 and 1977 to an average of some 25 each year from 1980 to 1985 (Bingham, 1986). As in other areas of law and policy, parties to environmental disputes have found mediation and negotiation to be more satisfying, less expensive, and more constructive than an adversarial approach.

Although negotiation can be viewed as part of this trend toward alternative dispute settlement, it differs from many of the forms of environmental mediation that Bingham and others have studied. First, the controversies that negotiated rulemaking aims to resolve extend beyond particular geographic sites or concrete disputes and have broad policy applicability. Second, regulatory negotiation is prospective in its orientation; its purpose is less to resolve specific disputes than to define general rules that will influence behavior later (Harter, 1982). In both respects, regulatory negotiation is more like the legislative than the judicial process as a framework for making policy (Eisenberg, 1976, p. 638).

This paper examines regulatory negotiation as a policy process, stressing in particular its contrasts with conventional rulemaking, its relationship to environmental dispute settlement generally, and its comparisons with more analytically-based approaches to formulating regulatory policies. The purpose is to sketch—at both a practical and theoretical level—the distinguishing features of negotiated rulemaking and to suggest limits of its institutional usefulness, rather than to assess the inner workings of the process itself. The next section gives a brief overview of the use of negotiated rulemaking at the U.S. Environmental Protection Agency (EPA). The following sections consider negotiation from a practical and then a theoretical perspective. The first perspective consists of evidence from negotiations conducted by EPA to date. The second considers negotiation in the context of administrative policy making generally. The conclusion offers an assessment of negotiated rulemaking as a policy process.

■ *Regulatory negotiation brings representatives of affected interests together to reach consensus on the content and sometimes the language of a proposed rulemaking. This article examines regulatory negotiation as a policy process, stressing in particular its contrasts with conventional rulemaking, its relationship to environmental dispute settlement generally, and its comparisons with more analytically-based approaches to making environmental policy. The article considers four of the seven negotiations conducted to date by the U.S. Environmental Protection Agency as cases for the analysis. Negotiation appears to offer a number of advantages over the conventional rulemaking process, including the parties' access to practical information that can be considered as it is needed; the opportunity to educate potential opponents and persuade them that adopting a particular provision will not harm their interests; and the parties' capacity to rank and trade off positions to maximize their own interests. A theoretical analysis, however, suggests limitations to the applications of negotiation—its theory of representation and its potential subordination of decision premises to the instrumental needs of the parties and the process. Within its limits, however, and with procedural safeguards, regulatory negotiation can offer a valuable complement to the conventional rulemaking process.*

## Regulatory Negotiation and Environmental Rulemaking

EPA began its Regulatory Negotiation Project in 1983 and its first negotiations in 1984.[1] Like most policy innovations, negotiation reflected a set of hypotheses: that affected interests in society could be represented in a committee of 15 to 20 people, that people would be willing to invest the time and resources to work through issues to a consensus, that the parties would be counted on to negotiate in good faith, that the Agency could commit to issuing a proposed rule based on the parties' consensus, among others.

### An Overview of the Seven Negotiations

EPA cast its first two efforts as pilots. The subject of the first negotiation was Nonconformance Penalties for

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Heavy-Duty Engines. The rule's purpose was to allow manufacturers who could not meet emissions standards to continue selling their engines, provided they paid a penalty that would become increasingly stringent in subsequent years. The second negotiation revised the criteria and procedures by which EPA granted state and federal agencies emergency exemptions from restrictions on uses of registered pesticides.[2] In both cases, the negotiating committees reached consensus on a proposed rule, which the Agency published. Both rules have since been issued in final form, and neither has been challenged in court.

The third negotiating committee was formed to revise regulations protecting farmworkers from pesticide hazards.[3] The negotiations began in November of 1985, but broke down four months later, when the five negotiators representing farmworker interests withdrew. As of September 1987, the Agency had still not issued a proposed rule for public comment. The fourth negotiation addressed the growing health problems posed by woodstove emissions. Its product was technology-based New Source Performance Standards (NSPS) that manufacturers would have to meet in future production. The negotiations began in March 1986 and concluded with a consensus on the core issues four months later. A work group drafted preamble and regulatory language which the full committee approved and the Agency published in February 1987.[4]

The remaining three negotiations took place in late 1986 and 1987. In the fifth negotiation, the committee revised the Agency's procedures for approving modifications in hazardous waste management facilities' permits. The negotiations ran from September 1986 to February 1987 and led to an agreement endorsed by 20 of the 21 parties.[5] Negotiations on the sixth and most complex rule to date began in September 1986. The subject was disposal of hazardous wastes by underground injection. The Hazardous and Solid Waste Amendments of 1984 (HSWA) had largely banned injection, unless EPA defined conditions for disposal that would protect human health and the environment. Although the committee reached agreement on several issues, the negotiations foundered in March 1987 on the question of whether or not the rules would allow migration of hazardous constituents from the immediate vicinity of the injection well.[6]

The seventh negotiation was notable for tight legislative deadlines and the number of issues it covered. Its subject was regulations required by the Asbestos Hazard Emergency Response Act (AHERA) to address asbestos problems in public and private schools. These covered inspections for asbestos, when to take response actions, monitoring requirements, operations and maintenance, and other issues. Passed in late October 1986, AHERA set a six-month deadline for EPA to publish a proposed rule. The committee was organized in January 1987 and met through February, March, and early April. Twenty of the 24 parties signed a consensus document which the Agency used as the basis for a proposed rule that it published in late April.[7] Given the intensity of the discussions, the range of issues, and the reservations of several parties, including some who had ratified the agreement, one observer's description of this as a "shaky" consensus is apt.

***From this perspective, negotiation appears as a merger of the principles and institutional philosophy of political pluralism with the techniques of alternative dispute settlement.***

These, in brief, are the seven rules negotiated by EPA to date. The committee reached a consensus on five, with important qualifications on the asbestos rule. Negotiations broke down on the other two, although in the underground injection rule agreement was reached on several issues. A later section of this article examines four of the negotiations in greater detail.

### The Design of the Process

EPA's process for negotiated rulemaking has been described in detail elsewhere (Fiorino and Kirtz, 1985; Harter, 1986; Perritt, 1986; Susskind and McMahon, 1985). For this discussion, it is enough to emphasize three characteristics. *First,* negotiations complement but do not replace the conventional process. They take place within the notice-and-comment format prescribed in the Administrative Procedure Act (APA). The objective in each negotiation is to reach a consensus that the Agency can use as the basis for a Notice of Proposed Rulemaking. Parties participating in the negotiations retain their right to judicial review of the final rule. EPA also charters the negotiating committees under the Federal Advisory Committees Act (FACA). This invokes a number of procedural requirements regarding public notice, open meetings, and summaries of the negotiating sessions.

*Second,* EPA participates as a party-at-interest in the negotiations. It also commits to publishing the committee's consensus as a proposed rule, so long as that consensus is consistent with the Agency's statutory authority. Like any other party, the Agency can block agreement or withdraw without prejudice at any point. The process design also distinguishes EPA's role of party-at-interest from its procedural roles of convenor, facilitator, and overall project manager. The Agency retains an outside contractor to convene the negotiations and recommends a facilitator for the negotiations, subject to the committee's approval.

*Third,* once the committee is constituted, it has substantial control over its mode of operation, composition, use of resources, and the terms and timing of its dissolution. At the outset, each committee adopts its own protocols. Additional parties may join only with the committee's approval. Decisions are made by consensus, which typically means "the concurrence of all interests represented" on the committee. The protocols allow participants to "discontinue negotiations at any time if they do not appear productive."[8] Participation does not prohibit a party from seeking judicial review of a final rule later. The committees are free to establish work groups, assign issues to them for study and recommendations, and allocate funds from a resource pool provided by EPA to support each negotiation (Fiorino and Kirtz, 1985).

### Products and Process in EPA's Negotiations

With the discussion above as background, this next section presents evidence from EPA's negotiations as a basis for assessing the strengths and limitations of the process.[9] The discussion considers three questions: How does negotiation appear to affect the products or substance of rulemaking? In what respects does the negotiation process appear to influence these products? And how does the process of negotiated rulemaking compare to conventional rulemaking?

In several of the negotiations, participants could cite ways in which the proposed rule differed from what they think would have emerged from a conventional rulemaking. These different provisions generally can be attributed to three characteristics of the negotiation process: the parties' access to practical information that can be considered as it is needed; the opportunity to educate potential opponents and persuade them that adopting a particular provision will not harm their interests; and the parties' capacity to rank and trade off positions to maximize their own interests. The result can be a proposed rule that the participants rate as more informed, workable, and pragmatic than what they would have expected in a conventional rulemaking. In addition, participants see value in the opportunity to engage in policy deliberations with Agency managers and representatives of other interests. Examples from four of the negotiations illustrate these points.

#### Resource Conservation and Recovery Act Permit Modifications

The parties agreed that three elements of the consensus would not have emerged from a conventional EPA rulemaking. One was a "default" provision granting automatic, temporary approval of a class of proposed modifications if the agency did not act within 90 days.[10] The second allowed the agency to grant a temporary authorization, under carefully-defined circumstances, during the period when a modification request is under public comment and agency review. The third provision expanded public comment and participation in all but minor modifications.

The default provision was the most controversial and important provision from the industry point of view, described by one representative as a "deal-breaker." The industry negotiators were willing to trade the expansion in public participation in exchange for the environmentalists' support for the default provision. The proposal to allow EPA to grant temporary authorizations was attributed variously to industry and state representatives, in both cases in the interests of a more flexible process. With one exception, the parties agreed on the temporary authorization as a way to streamline the process without a loss in public participation or environmental protection.

The parties agreed that the process influenced their product. The industry participants attributed their success on the default provision to the opportunity to educate environmental, state, and EPA representatives on the practical advantages of establishing a time limit on the agency review. The committee's access to information was considered one of the strengths of the negotiation process. The examples at times were complementary: an environmental representative commented on the usefulness of industry presentations on the types of permit modifications they typically would seek, while an industry representative appreciated the forum for presenting information on the types of changes routinely needed in permits. Other participants commented on the benefits of having direct access to the information EPA would use in developing its proposal.

#### Emission Standards for Woodstoves

The negotiations allowed the parties to gain the environmental benefits of an earlier compliance date while not imposing unreasonable compliance burdens on manufacturers. State, EPA, and environmental representatives wanted emission limits in place quickly so that reductions would contribute to meeting EPA's proposed ambient standards for particulate matter of ten microns in diameter or less. The manufacturers wanted to be assured of sufficient time to test, certify, and market new models before the compliance date. The committee agreed on several measures that would spread the demand for testing and make certification more predictable. These included a one-year delay in compliance for small manufacturers (fewer than 2,000 units the first year); a grandfather exemption from EPA certification for the first, two-year phase of the standard to cover models already approved under an Oregon program; the two-phase standard, which adopted Oregon's 1988 limits for models manufactured after July 1988 and stricter limits after July 1990; an alternative certification provision that allows temporary, default certification when "logjam" conditions exist in laboratory testing or EPA's application processing; and a waiver from testing for models identical to previously-certified designs.[11] As a result of these agreements, EPA's Phase I emission limits take effect in 1988 instead of five years after the proposed rule, which is the typical compliance period for an NSPS.

Parties thought the proposed rule's quality assurance program that reduced the risk to manufacturers of "look back" penalties or recall provisions would not have emerged from a conventional rulemaking. The proposed rule established a scheme of in-house quality assurance testing and EPA enforcement audits to monitor continued compliance with the emission limits.[12] Manufacturers can avoid penalties if they correct compliance problems and document their remedial actions to EPA. The committee also adopted an innovative method of funding the EPA compliance audits with a surcharge on the laboratory certification fees paid by the manufacturers.

Again, the parties cited the availability of practical information and the opportunity to consider it in open debate as principal advantages of the negotiation process. The Oregon and Colorado representatives provided information on the practices and experiences of two states that had established regulatory requirements for woodstoves. A particular advantage in this negotiation was that Oregon's experience and data could be brought quickly before the parties. EPA was able to share information it had collected on state practices, industry process descriptions, and costs that otherwise would not have been available before proposal. A manufacturer's representative thought that the negotiation setting and the relationships that had developed between the parties allowed for more thorough and effective use of the information. The sources of much of the data were at the table, and the committee could call on them for help in clarifying and resolving issues.

### Underground Injection Control

The law allows underground injection of wastes only when the EPA Administrator grants an exemption, based on the determination that "there will be no migration of hazardous constituents from the injection zone for as long as the wastes remain hazardous."[13] The Agency concluded that the assumptions underlying the rule were conservative enough and the siting and permit tests strict enough to meet the statutory prescription. The five environmental representatives disagreed, and the committee was unable to reach a consensus. Although the negotiations ended, the Agency relied on the progress made by the committee to that point to develop the proposed rule. Despite their inability to achieve consensus on the migration issue, several committee members agreed that the negotiations produced a more informed, specific, and workable rule than one they would have expected from a conventional rulemaking. In a letter to the Agency explaining their decision to withdraw, the five environmental members stated that "the negotiations have been worthwhile, have increased understanding of the issues and of the various parties' perspectives, and have stimulated communication among all involved."[14]

The no-migration issue aside, two provisions in the rule illustrate the effects of the negotiations on the result. One was the decision to allow continued use of fluid seals. On its own, EPA probably would have restricted or prohibited fluid seals because recent studies had shown that wells equipped with the seals had failed to detect operational problems. Discussions with the committee convinced EPA that the problems could be explained by inadequate training of operators and the complexities of operating the seals. "After extensive debate," the Agency decided to allow fluid seals but set training, monitoring, and operating requirements in the regulations.[15] A second outcome that the parties attributed to the negotiations was the decision to set ambient monitoring requirements for each injection well, rather than to prescribe them generally in the rule. In their discussions with the committee, EPA program managers were persuaded that they could not define generally workable monitoring provisions for all wells. A decision on the appropriate monitoring for each site, the Agency concluded, "depends on the hydrogeologic setting and characteristics of the operation."[16] The rule offered guidance for permit writers to set case-by-case monitoring provisions; this guidance was informed by the parties' discussions and reflected a consensus on a workable monitoring requirement.

***The agency is not delegating decision authority to affected interests but participating as one of them, with the same authority to block or promote consensus as any other party. What distinguishes the agency is that it is the only party with authority to withdraw from the negotiations and propose a rule as its own.***

Participants cited several instances of information being available or used more effectively in the negotiations. An EPA official thought that the process produced previously unavailable information on the volumes, constituents, and concentrations of wastes injected into wells. EPA also had access to previously confidential information on alternative wastewater treatment and disposal techniques. The parties agreed that the state representatives brought the committee useful information on field practices and the workability of various regulatory provisions. The result, one participant thought, was to allow a "better fit" between the EPA and state regulations. An industry negotiator thought that very little new information emerged but that the process allowed all parties to have access to relevant data quickly and at the same time. Another participant observed that the process induced groups to share information that they otherwise might not have released, in exchange for access to information held by others. As examples, she cited the parties' access to oil company maps on pressure zones and other data available in geologic surveys and oil and gas industry records. Comparing the negotiations to a symposium, a state negotiator benefitted from national data on underground injection that he had not seen previously.

### Asbestos-in-Schools

The consensus differed in three respects from what the parties would have expected in a conventional rulemaking. First, the consensus rule was far less prescriptive than an EPA rule would have been in specifying what actions school authorities had to take where asbestos is found. The negotiating committee agreed instead to allow local authorities "discretion within a range of acceptable response action alternatives, given the condition of the material, local circumstances, technological feasibility of response actions, economic considerations, and other relevant factors."[17] On its own, in a conventional process, EPA probably would not have allowed local authorities this degree of choice. The second difference was largely a result of the first. The committee agreed that granting the local authorities discretion to determine the appropriate response actions would place more emphasis on the qualifications and professional skills of people doing the inspection, assessment, and abatement work. The committee added to its agenda the task of developing a Model Contractor Accreditation Plan for States, formed a workgroup for this purpose, and adopted a plan that parties agreed was more stringent than what EPA would have adopted on its own.

A third difference in the consensus rule illustrates the practical flexibility that the negotiation process can allow. At issue were the relative advantages of two methods for determining that a removal action is complete at an abatement site. The two accepted methods for airborne monitoring of asbestos fibers are Transmission Electron Microscopy (TEM) and Phase-contrast Microscopy (PCM). TEM is technically superior, but costlier, and the instruments for performing it are less available. Parties at the table were in a position to recognize "the relative difficulty in finding laboratories which can perform TEM analysis in a timely manner."[18] The committee agreed to phase-in the TEM requirement over two to three years, during which PCM would be acceptable for monitoring smaller projects. By then, the committee expected that more TEM instruments would be available and the price and completion time for TEM analysis would drop.

Participants in the asbestos negotiation commented favorably on the availability of practical, "real-world" information that demonstrated the importance of a flexible approach to the remedial action requirements and the TEM issue. The Model Accreditation Plan originally was not on the committee's agenda, but the need for a rigorous scheme became clear as the discussions proceeded. EPA staff had worked with local education officials in administering a grant program for identifying asbestos-containing materials, but staff members learned more in the negotiations about deficiencies in the Agency's existing guidance documents and the school officials' concern with costs. The process also made EPA staff aware of other sources of technical knowledge, including experts that the American Institute of Architects' representative brought in to help resolve the TEM issue.

### General Observations on the Process

In each of these cases, parties stressed the benefits of negotiation as a deliberative process. These comments echo the views of the parties interviewed after EPA's first two negotiations (Fiorino and Kirtz, 1985, pp. 38-40). For many, the negotiation was their first opportunity to engage other parties face-to-face in policy discussions. The negotiation process was variously described as educational, as offering a forum for presenting arguments and evidence, as a way of understanding another side's point of view, and as a chance to generate new ideas and options with informed people holding diverse opinions. An environmental representative found it refreshing to be inside the policy process rather than on the outside looking in. A state official thought that he had far more influence than he would have had in a conventional rulemaking. An industry representative stressed the value of access to senior EPA program managers representing the Agency. Another appreciated the opportunity to make a case more than once and to bring the other parties around to a point of view.

The parties drew sharp contrasts between the negotiations and their experiences with conventional rulemaking. One described the conventional public comment process as "shouting into a hurricane." Another contrasted the collaborative problem solving in the negotiation to the polarizing tendencies of conventional rulemaking. Public comments "get lost" in the typical case, according to one participant. Written comments "are discounted or avoided," according to another, while in a negotiation "all points of view are heard and almost all plausible ideas are mentioned." An EPA participant concluded that "twenty creative minds . . . working to solve a problem, are bound to come up with something better than three EPA staff." In sum, their views confirmed many of the expectations of commentators on the negotiation process (Harter, 1982, pp. 28-31; Rushefsky, 1984, p. 146; Kerwin, 1983, pp. 407-409).

## Negotiation and Administrative Policy Making

This second perspective is more theoretical. From this perspective, negotiation appears as a merger of the principles and institutional philosophy of political pluralism with the techniques of alternative dispute settlement.

The aim of alternative dispute settlement techniques is to replace processes in which a third party renders decisions that are binding on the affected parties (adjudication and arbitration) with processes in which the affected parties themselves reach and consent to a decision (negotiation and mediation). In the first, the parties delegate authority to a third party and commit (or are bound) in advance to accepting the result. In the second, the parties retain authority to accept or reject a result, bound only by an agreement to which they consent. The third-party facilitator manages the process and guides the parties to an agreement, but possesses no independent decision authority and must maintain the trust and confidence of the parties (Bernstein and Warren, 1949; Eckhoff, 1969; Aubert, 1963; Administrative Conference, 1987).

Negotiated rulemaking differs from conventional rulemaking in many of these same respects. In conventional rulemaking, the administrative agency makes decisions based on whatever consultation with outside parties it thinks is appropriate. The agency's only legal obligation is to allow public comment on the substance of a proposed rule and then to respond to those comments before issuing a final rule.[19] In conventional rulemaking, outside consultation is *formal* because the information and opinions exchanged are written; it is *one-time* because the commenter typically has one opportunity to make a case before the agency issues the final rule; it is often *pro forma* because public comments may be seen as arguments to be rebutted or anticipated later in litigation, left largely to technical and legal staff rather than considered carefully by decision makers; and it is *constrained procedurally* because of *ex parte* rules, requirements of the record, and the probability of judicial review. The agency acts as the authoritative, third-party decision maker; the affected and interested parties are pleaders, bound to whatever conclusions the agency reaches.

Negotiation alters this process. The administrative agency agrees to act as the theoretical equal of the other parties by sitting at the table to negotiate and resolve issues. A decision is not made until the affected interests, through their representatives, consent to it. The agency is not delegating decision authority to affected interests but participating as one of them, with the same authority to block or promote consensus as any other party. What distinguishes the agency is that it is the only party with the authority to withdraw from the negotiations and propose a rule as its own. The equality of the parties around the table is in this sense a fiction, but it can be sustained if the agency and the other parties accept it. As in any alternative dispute settlement process, a breakdown in the negotiations means that the parties revert to a more conventional, adversarial, formal process—that of notice-and-comment rulemaking, with the agency shifting to its more traditional role as the authoritative, third-party decision maker.

Thus, in its premises, objectives, and techniques, regulatory negotiation reflects the trend toward alternative dispute settlement. However, because regulatory negotiation is prospective and general in its application rather than limited to a specific dispute, it also reflects another theme in American public policy making. That theme is pluralism, or what Robert Reich has described in the context of administrative rulemaking as "interest-group mediation" (Reich 1985, pp. 1619-1620).[20]

Reich's analysis sheds light on negotiation as a form of regulatory policy making, especially its contrasts with more analytical policy models. Reich proposes interest-group mediation and net-benefit maximization as the two visions that dominate administrative policy making. The first descends from pluralist political science and was more influential in the 1960s and early 1970s. The second descends from decision theory and microeconomics, and it was more influential in the late 1970s and early 1980s. In the first, the administrator is a referee who brings affected interests into the policy process to reconcile their demands and preferences. In the net-benefit model, the administrator is an analyst who defines policy options, quantifies the likely consequences of each, compares them given a set of objectives, and then selects the option offering the greatest net benefit or social utility. Under the interest-group model, objectives emerge from the bargaining among influential groups, and a good decision is one to which the parties will agree. Under the net-benefit model, objectives are articulated in advance as external guides to the policy process. A good decision is one that meets the criterion of economic efficiency, defined ideally as a state in which no one party can improve its position without worsening that of another.[21]

***Resolving a specific, clearly-bounded dispute over a zoning decision, construction of a highway through a park, or siting of a municipal landfill is fundamentally different from designing a general rule.***

Negotiated rulemaking exhibits many characteristics of the interest-group model. Consider, for example, that it aims to include affected parties who are in a position to block adoption or implementation of a regulation later, principally through legal challenge. It deliberately defines a structure and a process through which affected groups may interact. The parties' information needs are shaped by their interactions as they resolve issues. A good decision is one that is acceptable to the parties, including the agency, which is committed to issuing their consensus as a proposed rule.

Yet negotiation adds several institutional trappings to Reich's interest-group model. First, the agency is not a referee, but a party-at-interest possessing the knowledge, resources, and leverage to shape the negotiations. A neutral third party, not the agency, plays referee by facilitating the committee's deliberations. Second, the negotiations occur within the context of a well-defined, substantive statutory authority, such as the Clean Air Act. Third, the negotiation process complements but does not replace the procedural umbrella of the APA. Both the substance and the process thus are constrained and legitimated by statute. Fourth, a negotiated rule is as subject to judicial review as any other rule (Harter, 1982, pp. 102-107; Wald, 1985, pp. 17-25). As Harter has observed, judicial review is a "valuable check" on the integrity of the negotiations that can "prevent impermissible deals or logrolling by requiring that the resulting rule be within the agency's scope of authority (Harter, 1986, p. 62).

Even with these guarantees, a theoretical analysis suggests limitations in the process. One is its theory of representation (Bingham, 1986, pp. 77-83; Rushefsky, 1984, pp. 142-147; Wald, 1985, pp. 18-22). Even if the parties can be counted on to assert their own interests and those of the organizations they represent, what assurance is there that they can represent the interests of society at large? Like pluralist politics generally, negotiation is biased toward organized, influential interests in society. The most well-balanced committee is not competent institutionally to represent unorganized or uninfluential groups or broad conceptions of the public interest. A significant difference between other forms of environmental dispute settlement and regulatory negotiation is that the latter strains the representative capacities of the parties and the process. Resolving a specific, clearly-bounded dispute over a zoning decision, construction of a highway through a park, or siting of a municipal landfill is fundamentally different from designing a general rule.

Another limitation to the process is the way that it subordinates the fact and value premises of decision to the instrumental needs of the parties as they seek consensus (Reich, 1985, p. 1623; Eisenberg, 1976, pp. 665-680). Like Reich's interest-group model, negotiation stands in contrast with the net-benefit and other analytically-based policy models. If agreement is the test of a decision, rather than a comparison of policy options in light of clearly-defined criteria informed by systematic analysis, then the agency risks serious challenges to the legitimacy of the negotiated rule. If it is used too broadly or without appropriate safeguards, negotiation could become or appear to become deficient in standards, principles, and a defensible factual basis (Lowi, 1969).

## Two Perspectives on Negotiated Rulemaking

This paper has examined negotiated rulemaking from two perspectives. From a practical perspective, negotiation appears to have a number of advantages over the conventional process. The tangible policy effects are apparent in the EPA cases, including: phasing-in monitoring and certification requirements in the woodstoves and asbestos cases, based on an appreciation of technical, resource, and planning constraints; establishing default permitting and certification provisions in the RCRA permit and woodstoves rules, to give facilities and manufacturers greater predictability; expediting implementation of the woodstove standards, as a result of the parties' confidence on their consensus and use of the two-phase standard; allowing greater local discretion for asbestos abatement actions, while strengthening rules for accrediting the people who will do the work; recognizing the need to specify monitoring for injection wells case-by-case, based on well characteristics and hydrogeological features; deciding that the problem with fluid seals was less in the technology than in their operation and use, and setting the requirements accordingly; expanding public participation provisions in the RCRA permit process, with a result that the parties agreed would be more effective and workable.

The EPA cases also suggest the efficiency of the process in drawing out practical information in the hands of the participants, such as lessons from state regulators on their experience with a program (woodstoves and UIC); industry needs and practices regarding certification, permitting, and testing (RCRA permits, woodstoves, and UIC); or causes of local variation to account for in a general rule (UIC and asbestos). Negotiation also appears to offer a forum and incentive for policy deliberations among the agency and other affected interests.

From the second, theoretical perspective, negotiated rulemaking is a convergence of two themes. In one sense, it reflects a tendency to use consensus-based processes to resolve disputes. Yet negotiated rulemaking goes beyond other forms of alternative dispute settlement in the environmental area, because it is prospective and general in its application. In this sense, it is a form of interest-group mediation. Negotiation also differs from analytically-based policy models, such as a net-benefit approach. These two sets of distinctions—between negotiated rulemaking and site-specific dispute settlement on the one hand, and between negotiated rulemaking and analytical policy models on the other—are central to understanding negotiation as a policy process.

A theoretical analysis suggests two limitations to negotiated rulemaking—its theory of representation and its subordination of decision premises to the instrumental needs of the parties and the process. Both limitations are the obverse of strengths in the process. By aggregating interests in the form of knowledgeable parties with the resources and incentives to participate, negotiation can produce workable, pragmatic regulations that stand a better than usual chance of being implemented. The cost is that it can exclude parties and interests. By stressing agreement over analytical information or external decision criteria, negotiation can permit efficient use of relevant information and obtain the consent of the affected parties. The cost is that it can fail to meet objective tests of social utility. Given these limitations, do the advantages justify its use?

## Conclusions on Institutional Competence

The answer is not to reject negotiated rulemaking, which has shown clear benefits, but to determine its strengths, limits, and best fit with the decisions made by agencies.[22] With that end in mind, this article concludes with four general propositions about the institutional usefulness of negotiated rulemaking.

First, the negotiation process is more reliable and legitimate when it is applied to the resolution of "how to" rather than "what" decisions. The parties can claim to represent *interests,* but not *values.* This means that negotiation is less useful institutionally for decisions that determine acceptable levels of risks, or the distribution of risks across geographic areas, generations, or social classes. It is least suited as a policy process to "administrative decisions that are especially bound up with social values, or that are likely to have important effects on future choices" (Reich, 1985, p. 1640). For these kinds of decisions, Reich's process of "public deliberation" informed by scientific and economic analysis offers a more suitable model.[23]

Second, negotiated rulemaking is appropriate for "how to" decisions or what can be labeled "regulatory problem-solving." EPA's negotiations offer examples: procedures for modifying permits; conditions for granting exemptions from regulatory requirements; technology-based product or engineering process standards when the general criteria already are established; timing and implementation aspects of a remedial action program; or ambient monitoring and product testing rules. For such issues, the process can serve the agency and the public well, without stretching the representative capacities of the parties or the analytical capacities of the process.

Third, even when negotiation appears suitable, an agency must maintain the procedural legitimacy of the process. Products of the negotiation need to be sustainable under the agency's authorizing legislation. Agency managers should sanction their negotiators' positions before any commitments are made at the bargaining table. The procedural guarantees of the APA and FACA should apply. The issue assessment through which the agency convenes the negotiations should be public and thorough to permit an array of groups opportunities to participate (Bingham, 1986, pp. 91-94). Parties who conclude that the negotiations are not serving their ends should have the opportunity to withdraw, without prejudice, from the negotiations. Negotiated rules should be subject to the same judicial "hard look" as other rules upon review (Wald, 1985, pp. 17-25).

Finally, within its limits, and with procedural safeguards, regulatory negotiation offers a valuable complement to the conventional process. EPA's experience suggests that negotiation can yield rules that are superior policy products, are based on better information, and are more likely to reflect the informed preferences of affected groups. In addition, negotiation offers benefits as a deliberative process, in an arena where open, purposeful, and reasoned deliberation is rare. Further experience may confirm that regulatory negotiation used selectively can promote democratic processes and ideals more than conventional rulemaking can on its own.

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## *Notes*

1. "Notice of Intent," 48 Fed. Reg. 7494-7495 (February 22, 1983). Throughout this article, the terms "regulatory negotiation" and "negotiated rulemaking" are used interchangeably. The term "conventional rulemaking" is used here to refer to the standard notice-and-comment process established in the Administrative Procedure Act (5 U.S.C. sec. 551-558). For a discussion, see Harter (1982, pp. 8-28).
2. The "Notice of Intent" for the Nonconformance Penalties and Emergency Exemptions negotiations can be found at 49 Fed. Reg. 17576-17578 (1984) and 49 Fed. Reg. 31145-31147 (1984), respectively. For descriptions and analyses of these first two negotiations, see Fiorino and Kirtz (1985, pp. 33-38); Susskind and McMahon (1985, pp. 142-151); and Perritt (1986, pp. 487-489).
3. "Notice of Intent," 50 Fed. Reg. 38030-38033 (September 19, 1985).
4. 52 Fed. Reg. 4994-5066 (February 18, 1987).
5. 52 Fed. Reg. 35838-35862 (September 23, 1987). The Committee adopted a "Final Negotiating Committee Statement on Permit Modification Rulemaking" on February 24, 1987. The Chesapeake Bay Foundation representative did not sign the agreement because of reservations about the effects of the default provision.
6. 52 Fed. Reg. 32446-32476 (August 27, 1987).
7. 52 Fed. Reg. 15820-15882 (April 30, 1987).
8. An example of one of the committee's protocols is reprinted in Harter (1986, pp. 70-72).
9. In addition to the *Federal Register* notices and consensus documents, this section draws on the results of an internal EPA assessment of regulatory negotiation conducted during the summer of 1987. The study included interviews with 32 participants in the four negotiations examined in this article. I am indebted to Irv Auerbach of EPA's Program Evaluation Division for sharing findings from that study. Interviews conducted by the Harvard Negotiation Project after the first two negotiations revealed that participants also were positive about the process and the results. For an account, see Fiorino and Kirtz (1985, pp. 38-40).
10. Discussed in the Permit Modification Statement, pp. 8-9.
11. 52 Fed. Reg. 5000-5001.
12. 52 Fed. Reg. 5009.
13. 52 Fed. Reg. 32446 (August 27, 1987).
14. Letter to Michael Cook, Director of the Office of Drinking Water (May 4, 1987).
15. 52 Fed. Reg. 32461.
16. 52 Fed. Reg. 32463.
17. 52 Fed. Reg. 15829.
18. 52 Fed. Reg. 15831.
19. The core of the APA's requirements (5 U.S.C. sec. 553) is that agencies publish a proposed rule, give parties the opportunity to submit written comments, publish the final rule, and set an effective date of at least 30 days after publication of the final notice.
20. See also Stewart's (1975) analysis of "administrative law and interest representation" (pp. 1760-1789) and its inadequacies (pp. 1802-1805). The classic political science exposition and critique is Lowi (1969, pp. 55-97, 287-297). Judge Wald (1985, pp. 23-24) makes similar observations.
21. For discussions of net-benefits and other analytically-based approaches, see Lave (1981); Smith (1984); Swartzman *et al.* (1982); Shrader-Frechette (1985).
22. Ozawa and Susskind (1985) argue for the superiority of negotiation over adversarial approaches in the resolution of site-specific science and technological issues. Johnson (1987, pp. 10-14) discusses the issue of consensus on the results of risk assessments and thus the negotiability of risk-related policy questions. Rushefsky (1984) compares negotiated rulemaking to science courts and concludes that negotiation is suited better to risk

management decisions in which facts and values are interrelated. Kerwin (1983, pp. 410-414) considers criteria for assessing the fit of policy problems to consensual processes.

23. Such issues present larger challenges than negotiation by selected representatives of organized interests can meet. For discussions, consult the following: Reich (1985, pp. 1637-1638) proposes that administrators engage the public in a process of "social learning" and public deliberation in regulating risk; Shrader-Frechette (1985, pp. 202-207) considers the ethical aspects of risk analysis and proposes a "technology tribunal" that would bring scientists and citizens together to recommend on risk issues; Nelkin (1977) studied experiments in nuclear risk education and citizen participation in Sweden, the Netherlands, and Austria; Crosby, Kelly, and Schaefer (1986) describe the use of citizens review panels to draw the lay public into environmental decisions.

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# Regulatory Negotiation: Four Perspectives

*To provide a diversity of viewpoints on regulatory negotiation, the FORUM interviewed four participants in early attempts at the process. Kelly M. Brown is manager of emission control planning for the Ford Motor Co. David Doniger is senior staff attorney for the Natural Resources Defense Council. Dr. Robert S. Jackson is commissioner of the South Carolina Department of Health and Environmental Control and represented the Association of State and Territorial Health Officials (ASTHO). John McGlennon is a former EPA regional official and a mediator. Brown, Doniger and McGlennon took part in the EPA's regulatory negotiation on nonconformance penalties for truck engines; Jackson in the regulatory negotiation on exemptions to pesticide regulations.*

## Q. Why did you decide to take part in a regulatory negotiation?

**BROWN:** It's my job to respond to rulemaking. I've had the experience of going through the formal rulemaking process and it's sadly lacking. Most people on all sides would agree with that. I am concerned about the conflict and adversarial approach we've adopted in rulemaking. We yell at them, they yell at us and matters end up in court quite often. It doesn't make sense. Europeans can't believe the way we do things here, with government and industry in a position of fighting each other all the time.

**DONIGER:** Although I'm skeptical of how widely this tool can be used, I think that there's a class of regulations where, for a variety of reasons, it may be feasible and even attractive to negotiate. The typical EPA situation is one in which the public health and environmental forces want a regulation and industry doesn't. Often this will involve basic values like whether health will be compromised for economic reasons. But there are cases where the industry finally realizes that there is going to be a regulation, like it or not, and that they are not going to be able to put it off. Some of these regulations are what you might call "how to" rather than "what" rules.

In the case of regulatory negotiation on nonconformance penalties, the reason we wanted the rules and the reason the manufacturers wanted them were totally different. We wanted the rules to exist because they are an essential adjunct of the emissions standards themselves. Congress instructed EPA to set standards based on what the "technological leaders" could meet. The nonconformance penalties allow lagging engines to remain on the market for the time needed to catch up. The truck makers, of course, differ with us on how the standards should be set. But, being fairly risk averse, they wanted the penalty option instead of a complete ban on sale in case of last-minute problems with one or more engine models.

Interestingly, they could not decide whether high penalties or low penalties were in their best interests. You could see a Dr. Jekyll and Mr. Hyde transformation going on in the meetings, where a company would be arguing for having low penalties when thinking it might have to make use of them and a few minutes later arguing for having high penalties when thinking that a competitor might have to use them.

**JACKSON:** In my various contacts with EPA, one of my frustrations has been the uninvolved nature of the federal regulatory process and the inability of individuals who work with regulations at the state and local levels to participate in developing those regulations.

In an effort by state health officials to build a closer, more collegial relationship with EPA, I met with Lee Thomas several times. Among other things which we discussed was the subject of negotiated rulemaking. Following the meetings, ASTHO was invited to participate as a representative of state health officials in the pesticide exemption negotiation. The effort was totally in line with my feelings that more thoughtful regulation writing could avoid all kinds of controversy and down-the-road problems with implementation.

States have had a more wholesome, inclusive process for developing regulations that has led to greater ease of implementation because of the sense of involvement, participation and commitment that our process builds. I was delighted to find regulatory negotiation was very similar to a process I used as a state regulation writer. In general, regulators at the state level are closer to the people with whom they are going to have to interact on regulations. Many state regulations are required to go through legislative review which takes into account most divergent views. Powerful entities that have been left out of the process will clearly be powerful enough to interfere with passing regulations through a legislature, unless you have negotiated with them to a position of mutual comfort in the beginning.

So I was convinced that the process at the state level was better designed to produce good regulations and regulatory relations than the counterpart procedures that were in place in federal government. Those procedures were too isolated from the real world and too often written behind closed doors by lawyers and regulators who gave primary consideration to ease of implementation and enforcement and not always consideration to issues of fairness, equity and reasonableness.

**MCGLENNON:** I think I was selected as the convenor and facilitator because of the combination of my experience as a mediator and my knowledge of EPA as a former regional administrator.

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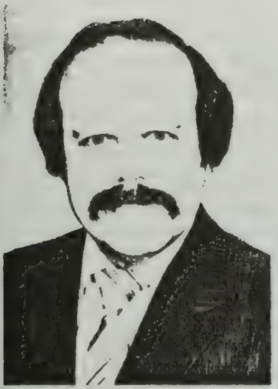
*Brown*

*Jackson*

*McGlennon*

## Q. What special problems did participation in this regulatory negotiation pose for you?

**BROWN:** Time and money. My travel budget got destroyed. That affected me personally and my employer. Also, for the first time, my competitors and I were part of a team. Rather than trying to outsmart each other, we had to consider each other's needs as part of an industry group. I had to balance priorities—the possibility that my company may need to use nonconformance penalties versus the likelihood that a competitor, possibly a new foreign competitor, would use or abuse nonconformance penalties.

There was one other special problem that inhibited the industry and didn't burden the environmental community or the regulators. I refer to anti-trust laws which impose on us a unique responsibility and govern our behavior behind closed doors. Also, in the auto industry we have a consent decree which limits the kinds of things we agree to by ourselves. We had to be very very careful in that. I asked one of our lawyers—it's uncharacteristic for an engineer to ask a lawyer to a meeting—to help me. A hard-working company lawyer went with me everywhere and participated very actively.

**DONIGER:** Lining up "our side" was fairly easy in the air pollution field. There are only a small number of organizations which work on the technical side of air pollution issues and a very much larger coalition of organizations that take the policy and technical lead from this core group. In other words, there's both structure and trust. I don't know if it would be equally easy in other environmental fields where the structure is less clear and the intergroup relations less well developed.

There is, however, a workload problem which, in turn, translates into a money problem. To participate in a regulatory negotiation takes about 10 times as much of our resources as commenting on a rule. Generally in a traditional rulemaking, you spend a few days or, at most, a couple of weeks, going through the record working up comments. This is much more reactive and selective and much less time consuming than sitting through days and days in a regulatory negotiation. The few professional staff members of environmental groups are stretched very thin if they are asked to participate in regulatory negotiations.

We raised with EPA the point that the Federal Advisory Committee Act contemplates the payment of people for the time spent on a regulatory negotiation committee. EPA wants to get the representation it needs. As a pragmatic matter, if there are going to be many negotiations running at once, it is not going to be possible for us to participate unless there is some kind of compensation to our organization for our time. So far, the issue has been badly mishandled by EPA. A variety of supposed legal impediments were interposed which turn out not to be meritorious. What EPA is really doing is hiding a policy and budgetary decision not to deal with this problem. I agreed to participate in the first negotiation because it was a demonstration project and it was hard to say with a straight face that we couldn't afford to do it once. What will happen in the future, I can't say.

**JACKSON:** The only problem was the logistics of trying to squeeze the somewhat intensive amount of work we had to do into a schedule that was already quite filled.

**MCGLENNON:** First we had to invent each step as we went along. To some extent, it was trial and error. We were using our best judgment as to how to go forward. We clearly made some mistakes along the way. Our goal was to design a process that would work, that would have the best potential chance for success, and that would create an environment in which compromises could be made by traditionally adversarial parties.

The second problem was identifying who the parties ought to be. That was a very complex process on which we spent about half the time and resources of the total project. If one of the key parties is left out, you're not going to achieve the kind of consensus that you are looking for. Someone will try to shoot down the proposed rule when it goes into the Federal Register.

The third problem involved the role of OMB. OMB, in the way that the Federal government operates, has a bite at the apple after EPA decides what they want in a rule. So we had to get OMB participating almost as a party during the negotiation process because it was very important to have OMB on board as EPA made commitments.

Another problem involved getting parties to keep their constituencies informed. We had people from Chrysler, Ford and General Motors and it was essential that they were able to represent their companies. The same with the EPA representative. There were four or five different agencies within EPA for which he was speaking. He had to be sure when he made a commitment that he was representing their interests as well as his own.

## Q. Do you believe the process produced consensus superior to the likely result of a more traditional rulemaking proceeding?

**BROWN:** Negotiated rulemaking, more than any other process, gave us the opportunity to explore every option and to come up with a whole range of ideas. We ended up keeping the best pieces of everyone's ideas.

**DONIGER:** In this case, yes. But I would add that there probably were a number of "acceptable" solutions to the nonconformance penalty problem. It's possible that EPA could have come up with a technically different approach through normal rulemaking procedures that would have been satisfactory to me. It's somewhat indeterminate.

**JACKSON:** Absolutely, both in terms of the ability of EPA to put the rule in place without having to face a great deal of controversy and in terms of the quality of the product. In the hands of all of the parties now is something which they understand, and can discuss with each other more comfortably and with less confrontation. The agency should be remarkably pleased with the improved relations it engendered with those who have been historically critical of the handling of pesticide exemptions.

**MCGLENNON:** Absolutely, and I think that is one of the really strong arguments in favor of regulatory negotiation. You come out with a better rule that represents the collective thinking of all major interests. In the traditional rulemaking process, a few individuals in a back room at EPA come up with a draft rule that is circulated around EPA for comment, then published in the Federal Register. That process ignores the collective thinking of the impacted parties who then take shots at the published rule and are immediately positioned in adversarial relationships. Litigation usually follows. That is why regulatory negotiation evolved in the first place. EPA was sick and tired of going to the court to defend its rulemakings.

Clearly, regulatory negotiation is better than the traditional process, but it is no panacea. It isn't the ideal process for all the rules that are going to be promulgated by all the agencies in the federal government. It is a process that should be considered by agencies which traditionally promulgate controversial rules—EPA, the Departments of Interior, Energy, Transportation, OSHA and the like.

## Q. In the broadest sense, what is your view of the future of regulatory negotiation?

**BROWN:** In the very near term, the time and cost factor is going to be important, even to industry people and even if the economy stays good. It's also going to be a problem for public interest groups. Also, not all types of rulemaking really lend themselves to negotiation, but, that's okay, you don't need to do all of them. There is nothing to stop an agency from soliciting comments from public interest groups and regulated parties before putting out a proposal. Although there are restrictions on *ex parte* communications during the course of the rulemaking, there are ways of having less formal hearings, such as "workshops" that are being experimented with.

**DONIGER:** It's good for a small class of cases in which there are sufficient reasons why both sides want compatible outcomes and there is some room in which to deal without offending major principles of either side. The future is clouded by the resource demands on groups like ours. Also, I'm uncertain about whether it is a good thing for EPA or other agencies to have an office which in an entrepreneurial way is looking for things to negotiate. A fuzzy-headed enthusiasm for negotiation almost led to the selection of a totally unsuitable topic for the first negotiation: site-selection and design criteria for low-level radioactive waste disposal sites. It was a terrible idea because, among other things, it would have required participants from our side to buy off on "acceptable" levels of death and illness.

The fear I have had is that groups promoting negotiation are going to succeed in giving negotiated rulemaking a life of its own irrespective of need. It seems to me the subject for negotiated rulemaking should be selected by the actors and not an institution in search of subjects. I'm a little leery about negotiation professionals who want to make a career out of finding things to mediate or facilitate. While people like that need to be around, it's a little worrisome when they start promoting and persuading people into negotiation of a particular rule or issue.

**JACKSON:** Careful examination of the outcome of this negotiation will demonstrate to the agency that it is not only in its advantage but compelling that it use negotiated rulemaking, whenever it is appropriate, as a means of developing the best possible regulation. Our experience so far is insufficient to reach the conclusion that every regulation must be done in that way. But for most regulatory issues it is a very positive process.

In every state that I'm aware of, a process is in place that is virtually identical to the process which EPA is experimenting with. It is not really appropriate to ask the question, Will the states follow suit? The states are already there. The willingness of EPA, by experimenting with this alternative methodology, to admit to itself and the rest of the world that its procedures may not have always been the best, is a compliment to the leadership at the agency and its willingness to be part of the dialogue of improved government.

**MCGLENNON:** We have just scratched the surface. We have had two successful negotiations at EPA, but "two roses do not a summer make." The process is not perfected. Yet, because of the success we have had, other agencies will look at this process favorably as an alternative to their existing rulemaking procedures. And we know that EPA is anxious to broaden the use of regulatory negotiation within its own rulemaking procedures. I think the use of regulatory negotiation can only grow.

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# Squaring Off at the Table, Not in the Courts

BY LAWRENCE SUSSKIND AND LAURA VAN DAM

*All too often government regulations end up as the subject of lawsuits. We could reduce this wrangling if the opposing sides drafted the regulations together.*

In late 1978, the U.S. Congress ordered the Environmental Protection Agency to develop standards governing the cleanup and disposal of uranium mill-tailings. Almost five years later, the agency finished issuing its rules. Despite its technical research, public hearings, and attempts to heed the comments made during the six-month public review and comment period, it was sued. Not until late 1985, seven years after the process began, did the court uphold the rules, excepting one provision.

Such a time-consuming process would be unfortunate even if this were an isolated case. But consider that about four of every five rules that the EPA promulgates are challenged in court. Not only is time wasted, but the courts often prove to be inappro-

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priate arbiters of technical regulatory disputes. It's no wonder that many people think the rule-making process no longer works.

Today, an alternative called "negotiated rule-making" offers great promise. The process involves gathering all interested parties together to hammer out a rule they can agree on. Informally known as "regneg," for "regulatory negotiation," this alternative could reduce court caseloads and increase agencies' speed in issuing rules. It also could produce wiser rules by eliminating the growing use of "advocacy science," in which concerned parties pay experts to undercut opponents' scientific claims. Advocacy science gradually is eroding the credibility of all scientific testimony in public disputes.

To test negotiated rule-making, the EPA has conducted several demonstrations of the process in the 1980s. For starters, it concentrated on a regulation that concerned truck emission standards. Once this was completed in 1984, the agency chose a rule focusing on the criteria for issuing emergency exemptions from pesticide-licensing regulations. Such exemptions allow farmers to use pesticides that are still undergoing tests for health risks. The Public Disputes Program, which is part of the Program on Negotiations at Harvard Law School, monitored the two demonstrations for the EPA. Both have been successful: no one challenged the negotiated rules in court. Plus, the rules took less than the standard two years to promulgate.

Of course, two demonstrations are not a complete proof. Earlier this year, during a third EPA demonstration of negotiated rule-making, which concerned pesticide protection for farmworkers, several farmworkers' representatives stopped attending meetings. They alleged that the proceedings had not been conducted fairly. The EPA continued to meet with the scaled-down negotiating group, leaving the door open for the farmworkers to return or at least comment on the draft regulations before the formal review and comment stage.

The EPA's demonstrations of negotiated rule-making and similar tests by other federal agencies have shed light on how and when negotiation can—and cannot—be used to develop regulations. Usually, regulations can be negotiated if they involve several issues that negotiators value differently. Then the participants can make trades. A regulation typically cannot be negotiated when it centers on a single emotionally charged issue. People are unlikely to resolve disputes if they have to compromise deeply held beliefs.

## From Neighborhoods to Federal Agencies

Mediated negotiation was tested for the first time as an alternative to litigation in the late 1960s, when experimental neighborhood justice centers tried to help residents informally handle such problems as landlord-tenant clashes. The idea caught on, and by the mid-1970s, what had become known as "alternative dispute resolution" was being used to settle all kinds of complex disagreements. For example, governmental bodies began using mediated negotiation successfully to decide where to locate highways, landfills, and airports.

By 1985, more than 25 dispute-resolution organizations had formed to help mediate a range of public disputes, from electricity-rate squabbles to controversies about the licensing of waste-treatment plants. Also, several federal agencies had recognized that they could apply negotiation techniques to potential regulatory conflicts. Now, the EPA, the Federal Aviation Administration, and the Occupational Safety and Health Administration have actually experimented with that process.

At the EPA, the idea of developing rules through negotiation emerged during the Carter Administration. Momentum slowed with the 1981 change in administration—but only for a short time. Then Republicans bent on regulatory relief recognized that the process might be more efficient than the traditional rule-making method. In 1983, the EPA announced that it was ready to develop several regulations using negotiation.

This meant altering a little of the standard rule-making procedure. Conventionally, a federal agency relies on its in-house expertise and consults with advisory committees made up of independent experts when it drafts a proposed rule. Then it publishes the draft in the *Federal Register*. That sets the stage for individuals, organizations, and even other government agencies to respond during a formal review and comment period. The agency must justify its final version of the rule in light of all the comments it receives.

For its demonstrations of negotiated rule-making, the EPA kept most aspects of the standard procedure intact. But it convened all interested parties to help draft, by consensus, the proposed rule.

In 1983, the agency came close to negotiating a rule that would set the minimum volume of low-level radioactive waste that had to accumulate before federal hazardous-waste regulations would come into play. Very quickly, the agency learned it had made a mistake, for environmentalists said they would refuse to negotiate this topic. They said they believed that *any* amount of waste should be treated as dangerous. From this experience, the EPA realized that negotiation cannot work when the focus is on a single issue that parties will not break down into components they can trade off.

The EPA settled on two less gut-wrenching topics from a list proposed by some environmental groups initially skeptical about negotiated rule-making. First, it organized a negotiation to develop a set of financial penalties for truck-engine manufacturers who fail to meet the Clean Air Act's emission requirements. The resulting regulation, negotiated by manufacturers as well as environmentalists, allowed non-complying companies time to catch up. But it forced them to pay significant fees until they complied.

The agency also announced its intention to negotiate a rule concerning emergency exemptions from pesticide-licensing regulations. About a year earlier, a number of critics had expressed concern that the EPA was granting too many emergency exemptions.

The rule-making on emergency exemptions illustrates how consensus building can work. The EPA began by setting a strict deadline, which was intended to keep negotiators from debating indefinitely. Further, the agency recognized that the parties—including farmers, chemical manufacturers, environmentalists, and state and federal officials concerned with health, pesticides, and agriculture—had different priorities about the issue. For example, they disagreed on what should constitute an emergency. Thus, the parties could make trade-offs. In the lingo of negotiation theory, there was room for a "win-win" settlement.

After choosing the emergency-exemption rule for a demonstration, the EPA hired ERM-McGlennon Associates, a Boston environmental consulting firm with extensive negotiation experience, to organize the negotiaton. ERM-McGlennon contacted more than 100 groups to learn who might want to participate. Some 16 organizations besides the EPA expressed interest in participating. These included four environmental groups, four state agencies, four farmers' associations, two manufacturing associations, and the U.S. Department of Agriculture. Six more parties were added later, after they learned of the pending negotiations through a notice in the *Federal Register* and asked to be included.

The negotiations probably could not have produced credible results without the involvement of such a diverse group of interested parties. But why were the organizations willing to participate? The reason is that they knew that a rule would be promulgated, no matter what. The offer to negotiate a draft of the proposed rule was too attractive to pass up. Presumably, they would have a chance to influence the rule-making without having to pay for a court challenge. And the participants didn't want to miss out on a process their opponents wanted in on.

The negotiating team met for an orientation session several weeks after the *Federal Register* announcement and adopted a set of ground rules. They agreed to operate by consensus rather than majority vote. They agreed that members could call time-out to caucus in small groups whenever necessary. And they agreed to a provision that represented both a safeguard and a threat: any party could withdraw from the process at any time.

During negotiations, the participants would have ample opportunities to review drafts with their organizations. And they were assured that any regulation resulting from the negotiations would be subject to the normal public review and comment procedure.

In the introductory session, the negotiators established an agenda and organized smaller working groups. The purpose of these groups was to examine specific topics of concern. In keeping with the open character of the negotiations, anyone could choose to be a member of any working group.

One working group was set up to develop guidelines on the use of up to $50,000 that the EPA made available to the negotiators. Half of this money had been put up by the agency, and the remainder of it had been donated by private foundations. Upon agreement from everyone, it could be used to fund fact-finding studies or to reimburse needy participants for travel and similar costs.

As it turned out, $20,000 from the resource pool paid the travel costs of some participants who convinced the group that they needed this support to attend. No money went for research.

In some negotiations, however, groups must commission technical research together. That is what the negotiators did in the first EPA demonstration of negotiated rule-making: they selected a single researcher to design a fair method of sampling engines that would be tested for emissions. In joint fact-finding studies, the negotiators can specify the research protocols they deem reasonable. This prevents arguments about the validity of technical claims. Plus, joint research keeps some negotiators from wielding more influence because their organizations have more money for studies. Finally, joint fact-finding means that the agency responsible for a rule does not have to choose between inconsistent facts that otherwise might be presented by different parties. Having to choose between data usually leads to opposition after a rule is developed.

During the first meeting, the EPA's Office of Pesticide Programs unexpectedly submitted an early draft it had drawn up for the emergency-exemption rule. The negotiators could have ignored that draft, since it was up to everybody to help with one. But they decided to use the document as a point of departure for their work. This not only gave them a head start but allowed the EPA to indicate what a rule promulgated under the traditional procedure might look like.

The first session also gave the negotiators a chance to become acquainted with the facilitator, the person the EPA had chosen to manage arrangements, keep the minutes, and orchestrate the consensus-building process. In any regneg, the facilitator has to make sure that everyone has a chance to talk and that the group stays on track. The facilitator must be nonpartisan and acceptable to all the negotiators.

The next time the group met, on September 28, 1984, it began to negotiate in earnest. The work continued through six formal meetings, including three that lasted two working days each. Negotiations ended four months after they began. The smaller working groups met throughout this period.

At the start of negotiations participants usually wonder which parties have the most power to achieve their goals. Generally, people presume that parties with fewer financial resources or less political influence will be overwhelmed or co-opted. But negotiators who are effective in expressing their views or in inventing suggestions that others can accept are likely to come out ahead. So are participants who back their claims with solid evidence or who build working relationships by listening well. And less politically powerful participants can increase their influence by forming coalitions.

That is what the environmentalists did in the rule-making on emergency exemptions. Instead of attending a casual dinner the facilitator hosted before the second meeting of the negotiators, the environmental representatives met to develop a coalition strategy and work out their differences. This separate meeting initially upset some other negotiators, but everyone soon realized that coalition building was key to the negotiation process. In fact, behind-the-scenes caucusing became common throughout the negotiations, as the facilitator used shuttle diplomacy to get various groups to make trades.

## The Nitty-Gritty

In the emergency-exemption demonstration, the definition of the word "emergency" was critical, since the resulting rule would concern emergency situations when certain pesticides could be used. The negotiators' give-and-take as they argued about the meaning of "emergency" reveals much about the nitty-gritty aspects of a negotiated rule-making.

The problem in defining the word concerned how widespread a pest outbreak has to be to justify using pesticides that have not yet been fully tested for health effects. Can a single farm experience an emergency? Or does an entire region have to be damaged?

The negotiators set up a working group to answer these questions, and almost everyone in the negotiations—16 people—joined. The first time the group met, there were numerous false starts and disagreements. The representatives from the farmers' associations wanted individual farms to qualify for emergency exemptions, while the environmentalists thought exemptions should be available only when whole regions were affected. Some participants were noticeably unwilling to be persuaded by others' arguments. Nothing was settled, but the participants did hear each other's views.

Later, the working-group members agreed that the definition of "emergency" should hinge on the definition of "significant economic loss," since the extent of loss would determine how dire a situation was. But a subsequent meeting was inconclusive.

While it would appear that little progress was being made, the members of the group were actually working hard, acquiring a better understanding of each other's concerns. Peter Schneider, the ERM-McGlennon principal at the meetings, suspects that the participants were checking back with their organizations to see what they had to stay firm on and what opposing arguments they could accept.

Finally, the full negotiating team decided that five key participants should tackle the matter. That task force reached what appeared to be a breakthrough in its first session. At this meeting the two environmental representatives indicated that they would not accept any rule in which the phrase "significant economic loss" applied to a situation with less than a regional impact. David Kronenberg, who monitored the sessions for the Public Disputes Program, believes the environmentalists thought that the regulations should allow only for those exemptions that would benefit a relatively broad sector of the public. After all, public health might be at risk if certain pesticides were used. Reçognizing that the environmentalists would not waver, the rest of the group agreed to bring this proposal to the full negotiating team for discussion.

But that group concluded that the definition of the extent of an impact should be flexible. It reasoned that applications for exemptions should be considered on a case-by-case basis. So the language in the rule was left ambiguous.

The negotiators also had to decide whether a significant economic loss should be measured in terms of crop yield or profitability. Several environmentalists pushed to define economic loss in terms of decreased crop yield. They suggested that farmers should not worry about apples with harmless spots caused by infestation, for example. The farmers' representatives argued that such spots could lower profits enough to result in a "significant economic loss." After extensive give-and-take, the full group finally agreed on a definition based on profitability.

The negotiators worked for several months with only minimal progress—not an unusual situation in a negotiation. Typically, at the outset negotiators busy themselves with fact finding and sounding out each other's views. Focusing on issues happens later, often after participants have developed alliances.

A collaborative style marked the later full negotiating sessions. According to a summary of the fifth meeting of the entire group, the participants "showed a clear willingness to listen to, discuss, and negotiate solutions that would be mutually beneficial, or at least mutually acceptable. The regulatory-negotiation process led to temporary partnerships that were, looking back at the beginning of the negotiations, nearly inexplicable. Who would have predicted that Earl Spurrier of the National Agricultural Chemicals Association, a representative and advocate of pesticide manufacturers, and Jay Feldman of the National Committee Against the Misuse of Pesticides, would find themselves working together . . . [to] meet the needs of both their organizations?"

By the end of the last scheduled meeting, the negotiators had drafted the entire rule, partly in working groups and partly en masse. This was quite different from the first EPA negotiated rule-making, when participants decided to reach consensus on the principles of the regulation rather than on the actual language of the rule. The emergency-exemption negotiators signed the proposed regulation, signifying that as individuals they would support it during the review and comment stage.

Three months later, on April 8, 1985, the proposed emergency-exemption rule was published in the *Federal Register*. In the meantime, the negotiators had explained the basis for the draft to their organizations, trying to ensure their support. Like anyone, members of these groups could have spoken against the draft rule during the several-month public review and comment stage. But none did.

The EPA received 16 comments from parties that had not been in the negotiations. The points were so minor, however, that none of the participants felt it was worthwhile to reconvene to discuss them. On January 15, 1986, the final rule was published. No lawsuits followed.

### "Not the Ogres You Thought"

It was a noticeable mark of success that the rule passed the close scrutiny of people who had not been directly involved in the negotiations. But there were other measures of success, too.

Generally, the participants were pleased with the result. By the end of the process all but one group indicated that the negotiations had produced a rule more representative of their interests than the standard process probably would have, and with less conflict. The participants were inclined to feel good about the outcome, since they had had a hand in shaping it. The process had given them more control than the traditional method of developing rules.

Several participants said they had benefited from the chance to communicate directly with each other and iron out long-standing disagreements in person. About half the representatives for the agricultural industry said they had gained a clearer appreciation of the environmentalists' motives. One negotiator commented, "In working with the opposition you find they're not quite the ogres you thought they were, and they don't hate you as much as you thought."

The EPA's technical staff also cheered the results. Staff scientists familiar with the details of pesticide regulation are convinced that the agency's statutory mandate to ensure technical soundness was upheld. These scientists believe that an extremely wise rule emerged.

### Answering the Worrywarts

Regardless of such success, some observers still fear that informal negotiation may be a dangerous way to develop regulations.

For example, when people first learn about negotiated rule-making they often question whether certain interests that ought to be represented might not make it to the table because they are not well organized, don't have the resources to participate, or fail to find out about the negotiations in time. These criticisms would be more accurately leveled at the traditional rule-making process. At least the EPA's negotiated rule-making has included an outreach effort by an independent party—one of ERM-McGlennon's jobs in the second regneg demonstration. And funds can be used to reimburse participants' costs. Moreover, a negotiated rule is subject to a full review and comment procedure. Finally, once the regulation is published, anyone can challenge it in court. Of course, the point of regulatory negotiation is to avoid courtroom battles, but the possibility of a challenge must remain as a safeguard.

David Doniger, senior staff attorney of the Natural Resources Defense Council, has urged that money from the resource pool be available for more than research and travel costs. He thinks the money should also be used for per diem compensation for those who need it. He has argued that negotiators representing relatively small, nonprofit organizations must be compensated, because their groups' resources can be stretched quite thin when a staff member participates in extended negotiations. He has pointed out that negotiated rule-making requires more staff time than merely preparing comments on proposed rules. While negotiators have not decided to use any funds for compensation so far, they always could if they wanted to.

Some administrative law experts distrust negotiation because they believe it can lead one side to coopt the other. They worry that individual participants might cozy up together and reach agreements that would not satisfy their organizations' memberships. If this happened, however, distraught members could criticize the drafted rules during the public review and comment stage. And groups are always free to set up their own review and comment periods before allowing their negotiators to agree to drafts. Moreover, every organization retains a direct veto over what its representatives have negotiated. Also, a group can replace its negotiators at any time if they fail to protect its interests.

Harvard Law Professor Richard Stewart and other administrative law experts believe that a government agency may compromise its authority if it agrees beforehand to be bound by a negotiated rule. But this criticism is beside the point. While delegating too much power to the negotiators could cause trouble, the participating agency can veto proposals in a regulatory negotiation.

Walkouts do pose a problem. The agency is left with a tough choice: should it continue the negotiations with the remaining participants, in the hope it will produce something close to consensus, or should it revert to the traditional approach? In either case, at least officials understand the interested parties' concerns better than if negotiations had not been attempted. Consider what has happened in the EPA's third negotiated rule-making demonstration.

The negotiating group, focusing on pesticide protection for farmworkers, lost seven of its eighteen participants earlier this year when the farmworkers' representatives announced after attending several meetings that they would not return to the talks. In their withdrawal statement, they said they were not given "the same respect and consideration" as agribusiness and agricultural chemical representatives, and that the proceedings were not conducted "in a fair, neutral and impartial manner." The EPA and the remaining negotiators offered to change facilitators, but the farmworkers' representatives declined. Actually, the farmworkers may have left for more reasons than they stated. They may have decided that they would lose an important organizing tool if they reached an agreement with their opposition.

The EPA and the other participants in this negotiation decided to proceed, hoping that the farmworkers' representatives would return. Hoping to make the final draft as acceptable as possible to everyone, the remaining negotiators also asked the farmworkers to comment on any drafts before the public review and comment stage.

Besides walkouts, there is one other danger with negotiated rule-making. The process should not be seen as a panacea for all the problems with the rule-making process. There will always be emotionally laden rules that present win-lose situations. The rule on low-level radioactive waste is one of those.

### The Idea Spreads

While many more agencies are likely to find it fruitful to develop some regulations by negotiation, they should be careful about which rules they choose to develop using this approach. They should steer clear not only of single-issue, win-lose rules but also of regulations that are not controversial and are not likely to be litigated. Negotiating these rules would be a waste of resources. Such lessons from the regneg tests are now being disseminated to all federal agencies by the Administrative Conference of the United States, an organization that includes senior administrative staff from all the federal agencies.

The conference's backing for negotiated rule-making may explain why more agencies are showing interest now. In February, the Department of the Interior requested a facilitator for a regneg concerning air pollution that may result from oil drilling off the California coast. In May, the Federal Trade Commission announced it was considering negotiating a rule on the use of alternatives to lawsuits for resolving consumer complaints about warrantied products.

For its part, the EPA has continued examining negotiated rule-making. Since March, the agency has been involved in a negotiated rule-making concerning performance standards to control air pollution from wood-burning stoves. It is also exploring the possibility of taking on at least two additional regulatory negotiations.

Interest in negotiated rule-making will undoubtedly spread. In less than five years, negotiated approaches could be used to develop as much as 10 percent of all rules.

Such an increase will require that interested agencies designate at least one senior staff member to oversee their negotiation work. These staff members will have to keep up to date with the latest breakthroughs in negotiation. Also, agencies will need additional appropriations to fund the collaborative technical studies that negotiators may call for. Extra money may be necessary to help some negotiators attend meetings as well. Typically, an agency that hopes to negotiate five rules a year might need to budget $250,000 or more annually for them.

Regulatory negotiation doesn't have to stop with negotiated rule-making. Permitting, licensing, and rate-setting disputes can be resolved through negotiation, too, and this work can be done at the local, state, and federal levels. Consider how negotiation has entered the regulatory arena in New Mexico. That state's Public Utility Commission recently invited a broad range of interested parties to help draft a plan to soften the impact a new nuclear plant will have on utility rates. Without a plan, consumers would be hit with significantly higher bills to pay for the plant's construction costs. In Massachusetts, Wisconsin, and Rhode Island, the state legislatures have enacted facility-siting laws requiring that builders of waste-treatment plants negotiate with potential host communities before receiving state licenses.

The key obstacle to more widespread use of negotiation in the regulatory process is doubt as to whether the method can really work. But doubt should not stop lawmakers from testing the technique. There is little to lose, even if negotiation doesn't succeed. Information will have been shared, and differences will have been narrowed. And if negotiation works, the courts' burden will be lessened, costs will be reduced, and the government's legitimacy as a regulator will be improved.

FURTHER READING

☐ Administrative Conference of the United States, "Procedures for Negotiating Proposed Regulations." December 13, 1985.

☐ Raiffa, Howard, *The Art of Science of Negotiation*. Cambridge, Mass.: Harvard University Press, 1982.

**BUSINESS**

**GOVERNMENT**

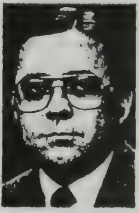
# Bypassing the lawyers

## *"Regulatory negotiation" gets test in agencies.*

**By WILLIAM H. MILLER/** This year the Environmental Protection Agency (EPA) will have some 300 regulations in various stages of development—more than enough, with its budget-slashed resources, to keep busy.

Yet, EPA will be even more occupied with another activity: defending itself in court. It currently is involved in more than 350 lawsuits. "Fully 80% of the rules EPA issues are challenged," laments Administrator Lee M. Thomas. "The impact on our agency is dramatic—about 125 staff-years of effort annually go to manage these cases."

The wave of litigation is not unique to EPA. To one degree or another, all of the federal regulatory agencies face the same problem. Lawsuits have become so common, in fact, that they are now considered virtually another step in the already-protracted rule-making process.


*Thomas*

For Washington's army of interest-group lawyers, the legal onslaught is a bonanza. But, by diverting the time and resources of agencies, it's costly to taxpayers. And as Mr. Thomas observes, it "transfers responsibility for federal rulemaking to the judicial branch."

**INCENTIVES.** An emerging trend, however, may provide relief to the embattled bureaucracy.

In a handful of instances, agencies are short-circuiting the litigation—and its accompanying cost, delays, and acrimony—with a promising new technique called "regulatory negotiation" (or "reg neg" for short).

Under the concept, when an agency decides to develop a regulation, it brings groups that would be affected by the rule to the bargaining table. There, meeting face to face with the aid of a mediator, the parties seek to reach an agreement on the terms of the rule *before* it is issued.

"Participants have incentives to cooperate because of the potential savings and the knowledge that if they fail to achieve some consensus on drafting a proposed regulation, then the agency will write the draft by itself," explains David Pritzker, staff attorney at the Administrative Conference. (The conference, a federal agency that works to improve government procedures, is credited with initiating the reg-neg concept.)

"The idea is for parties to hold out for what's important to them, but to give in on other points," Mr. Pritzker continues. "In the end, they'll realize that the best possible rule has come out, so they'll be less likely to sue."

**FAA SUCCESS.** In reg neg's limited application so far, fewer lawsuits *have* resulted.

The first successful test came at the Federal Aviation Administration, which used reg neg in developing its simplified rule setting the maximum hours airline pilots can fly at a stretch and the rest they must have between flights. Issued in final form last July, the rule replaced a 30-year-old regulation that had more than 1,000 pages of interpretation. So far, none of the parties—airlines, pilots' associations, and public-interest groups—has sued.

EPA, though, has been the biggest user of reg neg. In 1983 the agency brought 23 environmental and industry organizations together to negotiate a rule governing penalties on truck manufacturers whose diesel engines failed to meet federal emission standards. They reached a consensus so solid that EPA adopted the rule, which went into effect last September, virtually intact. It hasn't been challenged.

EPA is enjoying similar success with a rule—about to be promulgated—governing procedures the agency would use in granting "emergency" exemptions to state and federal agencies in registering pesticides. Twenty-four parties—representing environmentalists, users, manufacturers, and states—agreed on a draft rule that has drawn little adverse comment.

**FALLING SHORT.** Reg neg isn't always totally successful, though. EPA learned that in its third experiment: a rule revising standards for protection of farmworkers from agricultural pesticides. Of 25 parties that had been negotiating, seven—those representing farmworkers—left the table. The remaining 18 completed a draft rule last month that, although intended to "balance all interests," admittedly fell short of consensus.

Another reg-neg project, attempted by the Occupational Safety & Health Administration (OSHA), broke down completely. Industry and labor groups reached an impasse in trying to reach an agreement on a standard governing occupational exposure to benzene.

One reason for the breakdown, experts believe, was the failure of OSHA itself to become more involved in the negotiations.

Moreover, they say, the benzene rule wasn't a good candidate for the reg-neg approach in the first place; it had been a contentious issue for years, and the positions of opposing parties had become rigid.

Despite the collapse of the talks, the OSHA case "had an element of success," insists William R. Drake, deputy director of the National Institute for Dispute Resolution, Washington. "Everybody was surprised at how close the negotiators actually came to an agreement."

**NO PANACEA.** OSHA itself was encouraged enough that it will try reg neg again—in a rule on occupational exposure to MDA, a toxic substance.

Meanwhile, the Interior Dept. says it'll use the technique in setting standards on the air-quality impacts of California offshore oil drilling.

The Federal Trade Commission also plans to test the approach in developing a rule on resolving manufacturers' disputes with consumers.

And EPA already has negotiations underway on a rule setting emission standards for woodburning stoves; they're due to wind up in August. The agency expects more reg-neg experiments next year.

"We have no illusions that reg neg is a panacea or a substitute for the current informal notice and comment rule-making process," stresses Christopher Kirtz, director of EPA's reg-neg activities. "We think between 5% and 10% of our regulations lend themselves to the technique."

That percentage varies from agency to agency, says Mr. Drake. But he sees reg neg "expanding rapidly out of the experimental stage" during the next few years, becoming routine not only in some federal agencies, but also in some state-government agencies. "As agencies get experience with reg neg," he says, "they'll discover it is a 'winner'—a beneficial method highly appropriate for at least some of their rulemaking." ■

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# Regulating Wood-Stove Emissions

## *Proposed Regulations Could Cut Related Pollution in Half*

**By Mike McClintock**

While diligent homeowners have been gathering logs for the wood-burning season, wood-stove manufacturers and environmental groups have been burning the midnight oil.

For the past six months manufacturers and environmentalists have held intensive discussions with the Environmental Protection Agency (EPA) about wood-stove emissions. The result: a national standard for regulating emissions that will be proposed by the EPA in January.

Once all the provisions of the proposed standard are phased in, a process that is designed to take two years, pollution from wood stoves in many of the 20 to 25 million households in this country that now burn wood may be cut in half. Stoves designed to meet these emission standards will burn wood more completely. This increase in combustion efficiency will also increase heat output.

Although wood is commonly thought of as an ecologically benign heat source (in part because it is a traditional, unprocessed, renewable fuel), its combustion byproducts are an increasingly serious threat to air quality.

Wood-burning produces potentially dangerous gases such as carbon monoxide. It also produces a variety of microscopic particles known collectively as polycyclic organic matter (POM). Many POM components have been characterized as carcinogenic by the EPA.

Before fuel costs escalated in the mid-'70s, causing a surge in interest in alternative heating sources, emissions from wood stoves were considered insignificant. But wood-stove sales have climbed to about 800,000 a year, and on cold winter days many towns are now shrouded by a noticeable layer of wood-stove smog.

In Denver, wood stoves now produce almost half as much carbon monoxide pollution as cars and trucks. In Missoula, Mont., a light on a highly visible water tower is turned on when air quality monitors indicate wood-stove pollution is too high. When the light is on, inspectors can hand out tickets to homeowners who continue to feed their fires. In some states, selected municipalities have banned new wood-stove installations altogether.

Colorado and Oregon have already set standards for wood-stove emissions. Several other states, including Maine, Vermont, Massachusetts, Montana and Washington, have been considering similar legislation to control wood-stove pollution. With so many states addressing the issue it was no surprise when discussions began about national standards.

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In response to pressure from environmentalists, the EPA formed a committee six months ago to evaluate wood-stove regulations. It consisted of manufacturers, the Wood Heating Alliance, an industry trade group, representatives from state environmental agencies, and others.

Common interests expressed by the various parties have sped up negotiations over the proposed standard. An EPA spokesman said it is not uncommon for the regulatory process to take as long as four years. In the case of wood-stove emissions, members of the committee feel that the proposed standard will meet little resistance and should go into effect within two years.

During the formulation of the proposed standard—which is based on, though considered more stringent than the Oregon state standard—some provisions were dropped. Joe Kowalczyk, from the Oregon Department of Environmental Quality, said, "We would like to have seen stove combustion efficiency included in the standard, the way energy-efficiency ratings are provided on air conditioners."

David Doniger, senior attorney for the Natural Resources Defense Council, an environmental group, reports that his organization was willing to forgo some provisions of the standard in the interest of time. "By agreeing on a standard two years ahead of schedule, we will include over 1½ million wood stoves sold during that period that otherwise would not have been covered," he said. The standard will not be retroactive.

The first phase of the standard is scheduled to take effect July 1, 1988. Some stoves already meet the new emission criteria. And many manufacturers will bypass interim regulations taking effect in 1988, going ahead with designs that will meet the final, 1990 national standard.

Many of the provisions are complex, involving particulate emissions measured in grams per hour. It is significant that emission levels will be tested at all burn rates. In some stoves, vigorous combustion burns the wood thoroughly, and produces temperatures hot enough to burn off creosote and other combustion byproducts. But low-level combustion, common when ventilation is retarded to maintain a fire overnight, may produce much dirtier exhaust.

Just as catalytic converters have been used to reduce exhaust emissions in cars and trucks, similar technology may help many stove manufacturers meet the new standard. Some models already include the wood-stove version of a car's catalytic converter, called a catalytic combustor.

Tests by Corning, the firm that developed the combustor, and independent labs, show that the honeycomb fixture built into a stove can reduce creosote by 90 percent, and reduce many exhaust pollutants by 80 percent while providing up to a 50 percent increase in heat output. The specially coated honeycomb acts like a supercharger, reburning exhaust gases. This burns wood more completely, producing more heat and cleaner exhaust.

If adopted, the final, 1990 national standard for wood-stove emission limits will be 4.1 grams per hour for catalytic stoves, and 7.5 grams per hour for non-catalytic stoves.

In the meantime, consumers who want to buy stoves that will meet the new standard can write for an updated list of stoves certified under Oregon rules, the model for the national standard. The Oregon Department of Environmental Quality (Box 1760, Portland, Ore. 97207) will send, free on request, its Wood Stove Certification List, which is updated monthly.

It now includes 72 stoves that meet current Oregon standards; about half will meet the new standard. Combustion efficiencies and heat output capacities of the stoves are included with emission rates.

**Asbestos Abatement**

# EPA Negotiates Proposed Rule on Asbestos in Schools, Part of Continuing Reg-Neg Project

*Environmental Protection Agency's use of regulatory negotiation to arrive at proposed rule on asbestos hazard abatement in schools is subject of two-part article. First part introduces EPA's ongoing project on regulatory negotiation and discusses pre-negotiation activities in asbestos effort; second part will focus on observations, by facilitators and participants, regarding asbestos negotiation and its outcomes.*

The Environmental Protection Agency, working under a congressionally mandated 180-day deadline, used regulatory negotiation to develop its proposed standards for addressing asbestos problems in public and private schools, issued April 30, 1987. According to Michael Stahl, acting director of the agency's Asbestos Action Program, about 107,000 schools in the U.S. might be affected by the proposed rule, which would cost an estimated $3.21 billion to carry out over 30 years. A final rule based on this proposal is to be issued by October 20, 1987. Representatives of 24 groups whose interests are affected by the Asbestos Hazard Emergency Response Act of 1986 (AHERA) — schools, asbestos manufacturers, asbestos abatement professionals, labor, environmental organizations, the EPA, and others — participated in the negotiation process; 20 of these groups signed a statement agreeing that the language developed by the committee should be used as the basis for the proposed rule.

The proposed AHERA regulation is the most recent rule to be negotiated by EPA since it began its Regulatory Negotiation Project in 1983. According to agency figures, as many as 80 percent of its rules are challenged in court, often by both sides of an issue. EPA started the project because it felt there must be a better way to proceed — for at least some of the approximately 250 regulations under development at any time.

As EPA proceeds through various regulatory negotiations, the project is establishing:

- the value of developing regulations by negotiation;
- the types of regulations that are most appropriate for this process; and
- the procedures and circumstances that best foster negotiations.

Project materials prepared after the completion of seven negotiations state that the project has concluded that, while the process "is not a panacea" for short-comings in the existing regulatory process, "it appears to hold considerable promise as an efficient and effective way to develop select regulations." None of the rules issued after negotiation has yet been challenged by litigation.

## The Reg-Neg Process

In the regulatory negotiation or "reg-neg" process, individuals and groups with negotiable interests directly affected by the rulemaking work together with the agency in a cooperative venture to develop a proposed rule by committee agreement. Parties with different interests meet face-to-face and share information, suggest alternatives, identify areas of agreement and disagreement, and solve problems in an attempt to reach a mutually satisfying result. The goal of the negotiating process is consensus, a term that is defined in each negotiation by the parties themselves.

The EPA project has developed criteria for selecting instances where this approach has a high probability of success. To qualify, a rule must:

- present a limited number of related issues, none of which involve fundamental questions of value, and for which there is sufficient information to permit resolution and several possible resolutions consistent with the legislation;
- have a time factor that lends some urgency to issuing the regulation;
- involve a relatively small number of identifiable parties, in an appropriate balance and mix, who have a good faith interest in negotiating a consensus.

Once EPA has selected a rule as a candidate for the process, it gives notice of this fact in the Federal Register. This notice identifies the key issues to be addressed in the negotiation and the interests affected by the negotiation. It solicits public comment on these issues and identified interests, and on whether the reg-neg process should be used to develop the proposed rule.

If the agency elects to proceed with the negotiation, the negotiation group is chartered as a Federal Advisory Committee. Under the Federal Advisory Committee Act of 1976, all committee meetings must be open to the public, and announcements of all meetings must be published in the Federal Register. EPA charters have permitted reimbursement of committee members for travel and per diem, but not compensation for their time.

In a typical negotiation, the parties meet once a month in two-day sessions over a period of four to six months to generate a proposed rule. A senior EPA official from the office responsible for developing

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the rule acts as the agency's chief negotiator. Senior officials authorized by organizations to represent their interests negotiate on behalf of their constituencies. A neutral facilitator chairs the negotiations, keeps the process moving smoothly, and assists in resolving disputes. EPA promises to use any consensus that is within its statutory authority as a basis for the proposed rule, but in the event the committee is unable to reach consensus, EPA will develop its own proposal. The proposed rule is published in the Federal Register for public comment. From this point on, the process parallels that of the traditional rulemaking process.

## The AHERA Mandate

On October 22, 1986, the President signed into law the Asbestos Hazard Emergency Response Act of 1986, PL 99-519. The legislation states specifically that one of the reasons for its enactment is the "lack of regulatory guidance" from EPA on asbestos abatement. It imposes a 180-day deadline for issuance of proposed regulations pertaining to the inspection and abatement of asbestos-containing materials in public and private schools (by April 20, 1987), and a 360-day deadline for issuance of final rules (by October 20, 1987). The statute details the areas to be covered by the regulations.

## Beginning the Process

EPA program officials suggested to the negotiation project staff that AHERA might be an appropriate candidate for regulatory negotiation. They indicated that many of the organizations and interest groups that would be affected by the rule had worked together during the passage of the legislation. EPA held an open meeting on December 8, 1986, to determine whether its initial criteria for selecting a rule for negotiation were satisfied, and gave notice in the January 13, 1987, Federal Register that it was considering a negotiated rulemaking for AHERA.

From December 18 through January 23, two "convenors," Susan Carpenter, an independent mediator, and Kathy Tyson, Deputy Director of the Regulatory Negotiation Project, worked to identify and involve those individuals and organizations who could represent affected interests during the negotiation. The convenors helped the agency to assess both the suitability of the rule for negotiation and the willingness of the necessary range of parties to participate. According to Tyson, the goal at this stage includes ascertaining what the interests of the parties are and whether the parties can agree to basic assumptions as to how the negotiations will operate (whether they will "align on the protocols") and on the scope of the issues to be negotiated.

> *"The regulatory negotiations process appears to hold considerable promise as an efficient and effective way to develop select regulations."*

"Negotiation begins in the convening process," Tyson said, as the convenors work to build a rapport that can be useful later. The convenors talk to individuals, answer questions, and attempt to alleviate concerns honestly. They point out the limits of the reg-neg process and the parties' option to leave at any time. As appropriate, they work to assure the parties of the good faith of the others who will be involved in the negotiation. Tyson was involved in AHERA as both a convenor and part of the facilitation team, and found that "when the tough spots came during the negotiations, the trust and comfort developed during the convening process were useful."

After an organizational meeting on January 23, the committee was established with representatives of 23 interests, including, national education organizations, labor unions, asbestos product manufacturers, the environmental community, asbestos abatement contractors, professional associations of architects, consulting engineers, industrial hygienists, states, and EPA.

## Facilitation and Logistics

As the convening process went on, the Conservation Foundation, a Washington, D.C., based group that has served as prime contractor providing convening and facilitation services for EPA's recent regulatory negotiations, pulled together a team of facilitators and coordinated logistical arrangements. The facilitation team was headed by Owen Olpin, of the Los Angeles law firm of O'Melveny & Myers, who had previously chaired the committee of the Administrative Conference of the U.S. which developed the ACUS recommendation on federal use of regulatory negotiation, and Eileen Hoffman, of the Federal Mediation and Conciliation Service. The FMCS provided two additional facilitators, and the EPA Negotiation Project and Conservation Foundation each supplied one. The EPA Negotiation Project also supplied individuals to support the team.

Leah Haygood, the Conservation Foundation staff member on the team, noted that the team was more numerous than those used in other EPA reg-negs. This was advantageous, she said, in that it enabled facilitators to cover the various working group meetings that were held simultaneously in order to accommodate the time constraints imposed by the statute.

The facilities for the negotiation were provided primarily by one of the parties. The National Education Association came forward and offered enough room in its headquarters to permit the sizeable group —

which included not only those parties with seats at the negotiating table but also their staff and experts and members of the public — to meet not only in plenary sessions but in smaller work groups and caucuses.

## Negotiation Training

Before beginning the actual negotiation process, the parties participated in a one-day training session provided by Chris Kirtz, Director of the EPA Regulatory Negotiation Project. The session was generally based on the principled negotiations model set forth in *Getting to Yes: Negotiating Agreement Without Giving In*, by Roger Fisher and William Ury (1983, Penguin). It was designed to give participants a common set of reference points and the opportunity to practice relevant skills — for example, stating their interests rather than their positions. Exercises placed some participants in a facilitative role, in order to create empathy for what a facilitator can and can't do, and to allow them to try out a role they could later play in negotiating sessions. Such training gives people a chance "to see each other before they sit down to negotiate, and to play a variety of roles before values are at stake," Tyson commented.

## And Then What Happened?

The first negotiating session was held February 5-6; EPA asbestos program staff presented an issue paper and a draft regulation for discussion and use by the committee, and the members set to work. Three work groups were organized; each would address clusters of related issues and report back to the plenary session. A second session took place February 17-18.

> *"When the tough spots came during the negotiations, the trust and comfort developed during the convening process were useful."*

As negotiations continued March 9-10, an unexpected development occurred: additional parties sought inclusion on the committee. An attorney for big city school districts addressed the group and explained that large-scale litigation against manufacturers of asbestos products over the costs of asbestos abatement has been going on in federal district court for four years. He described the lawsuits as protracted and bitterly fought, and argued that the rule to be developed by the committee will have substantial effects on this litigation. He asked the committee to allow plaintiff school districts, and the state attorneys general who represent them, to join the negotiation.

This development, and the very tight timeline governing the process, were two important factors that contributed to the unique character of the AHERA regulatory negotiation and the proposed rule that it produced. How the committee resolved the inclusion issue, how the negotiation worked, and what its outcomes were, will be discussed by participants and facilitators in the second part of this article.

**Asbestos Abatement**

## Participants and Facilitators Discuss Negotiation of EPA's Proposed Rule on Asbestos in Schools

*Tight statutory timeline and late-entering parties involved in related litigation contributed to unique character of EPA's regulatory negotiation on asbestos in schools and proposed rule it produced; this reg-neg and its outcome are considered by several participants and facilitators in second part of two-part article. (Part one, which discussed EPA's ongoing project on regulatory negotiation and pre-negotiation activities in asbestos effort, appeared in previous issue. See 1 ADRR 133.)*

Representatives of 24 interests — national education organizations, labor unions, asbestos product manufacturers, the environmental community, asbestos abatement contractors, professional associations of architects, consulting engineers and industrial hygienists, states, and the Environmental Protection Agency — participated in the regulatory negotiation used by the EPA to develop its proposed rule on asbestos abatement in schools. The proposed rule was signed by EPA Administrator Lee Thomas on April 20, 1987, the deadline set by Congress when it enacted the Asbestos Hazard Emergency Response Act of 1986 (AHERA). It was published for public comment April 30, 1987.

Members representing 20 of the 24 interests seated on the committee signed statements supporting the use of the agreed-on portions of the language as the basis of a proposed rule. All committee members, whether or not they signed the consensus statements, retained for themselves and for their constituencies all rights, including the right to comment during the public comment period.

The proposed rule, and the consensus statements supporting it, were developed during an eight-week negotiating process. Open sessions were conducted February 5-6 and 17-18, March 9-10 and 26-27, and April 1-3. All followed a basic pattern: committee members met in self-selected work groups to address clusters of related issues and generate alternative approaches; the members then reconvened in plenary sessions to review, modify, or adopt the recommendations of the work groups.

An unanticipated development occurred during the March 9-10 meeting, when additional parties petitioned for inclusion on the committee. These parties — representatives of big city schools and states who are involved in litigation to recover from former manufacturers of asbestos the costs incurred for asbestos abatement — were seated by the committee in a compromise move: a new seat was added for one party and one party was permitted to share an already existing seat.

The pending litigation, the late-entering parties, and the tight timeline for the negotiation influenced both the process of the AHERA reg-neg and the proposed rule and consensus statement it produced. An illustration of the process in operation, and observations on the process and its outcomes by some of the participants and facilitators involved, are the focus of the remainder of this article.

### A Negotiating Session

One hour's observation of a plenary session illustrates some of the features of the process in action.

The second day of the fourth negotiating session began March 27, as facilitator Owen Olpin introduced the two newly admitted members to the plenary session. After the committee heard and adopted the minutes of the prior session, the facilitator complimented the group on its previous 14-hour day, and its "high quality efforts in dealing with very difficult problems." He praised the members for their "good faith and civility" and their ability to identify one another's interests and "bridge differences to reach consensus." He reviewed the tentative scheduling of work groups and plenary sessions for the three days of the final meeting, April 1-3. As he called for reports by the work groups, he reminded participants of the need to "redouble efforts to stay on track on the precise issues to be decided." He observed that "it's now clear what our various general philosophies are, and we need specific decisions regarding the regulation."

A representative of one work group took the floor, handing out drafts of a portion of the regulation prepared by the group. He led the plenary session in a page-by-page discussion of the draft, flagging the issues on which the committee had achieved no agreement and identifying and explaining those that had been decided. Other participants variously requested clarifications, interpretations, or substitution of other language. The work group representative occasionally stopped to ask the committee whether it was satisfied with the progress of the discussion; at one point he laughed: "Let this be a warning to the rest of you; I'm only the messenger if I get shot at."

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When the discussion focused for a long time on a single contested issue, Olpin stepped in. "Is this an issue that we can resolve in a few more minutes discussion?" he asked, suggesting "If it's not, let's send it back to the work group for further cooking and move on to those issues we can resolve." He said: "The notion is to put as many things on the shelf as completed as possible, but you're not precluded from raising concerns later on." Later in the morning he observed: "We've been noodling around as to the kind of consensus document that might be used to embody the consensus of this group, which has a short time period to deal with enormously complex issues. The document might reflect that fact, and state a general consensus that doesn't bar you from further polishing. You might think about candidly recognizing 'wiggle room,' and committing to concepts and then clarifying and polishing later on."

In fact, Olpin's suggestion is reflected in the documents that emerged at the end of the reg-neg.

## Participants and the Reg Neg

Participants in the negotiation who were interviewed for this article generally agreed on three features of the experience: the good faith and intense effort brought to bear by the participants; the effectiveness of the facilitators and the EPA asbestos program office in managing the negotiation; and the demanding nature of the process and timeline.

For example, Miriam Rosenberg, who participated on behalf of her former employer, the National Parent Teacher Association, stated that the people at the table demonstrated "good faith and good will" and "surprising lack of bitterness" in dealing with contested issues. While the process itself was one of the most taxing in her experience, she said, "it was a worthwhile expenditure of effort." The former representative of the the Council of Chief State School Officers, Diane Stark, now with the National PTA, noted that people "tried to work together rather than getting angry," and that "really vocal disagreements" were relatively infrequent.

According to William H. Lewis, Jr., counsel for U.S. Gypsum Co., a former manufacturer of asbestos surfacing products, EPA did an "outstanding job" as to both substance and process, particularly within the tight time constraints. Thoughout the process, he said, EPA staff "kept pushing, trying to understand what the real issues were."

Paul Schur of the Connecticut Department of Health remarked that the process was intense in that it required individuals to attend numerous meetings and review difficult written materials within a short period of time, all the while attempting to represent their constituencies as best they could and deciding which points to push and which to concede. However, he said, the process was "well run" and the facilitators and EPA staff "showed people various ways of reaching consensus even though they disagree on particular points."

*"While the reg neg experience was taxing, it was a worthwhile expenditure of effort."*

Beyond such general comments, the views were more divergent.

## Better than the Alternative

Two members of the committee — William Lewis and Miriam Rosenberg — stressed that any evaluation of the AHERA experience must begin with a consideration of the alternative — the typical notice and comment rulemaking procedure. Lewis compared the proposed rule with the first draft that EPA prepared for discussion by the committee: the final proposal is "substantially different" and was affected by the interests of everyone at the negotiating table, he said. The end result makes "better health sense and is more effective in achieving the statutory mandate."

Rosenberg stated that the "good and bad" of the process and the rule "can't be evaluated in a vacuum." In the typical process, the government drafts a rule and accepts input "only when the rule is close to being in concrete.". Although the proposed rule here reflects compromise rather than a single viewpoint, her constituency views it as "probably the best it could get." Emphasizing that she was speaking as an individual rather than for the constituency she represented, she noted that "in this administration, reg-neg has been a very positive force, but if you had an administration more strongly protective of human health and environment, it could be argued that such protection shouldn't be subject to compromise."

## Misgivings

Other participants expressed reservations about the reg-neg process in general. One is Brian Christopher, director of the Alice Hamilton Occupational Health Center, a Washington, D.C., based nonprofit organization that provides technical assistance and training in occupational safety and health. "From EPA's point of view," he said, "it's a good way to write a regulation. It enables them to kill two birds with one stone: they get individuals with expertise to tap and bring to the table interested parties with the presumption that they will compromise to get a regulation." However, Christopher said, "The presumption of compromise may not serve the purpose of protecting public health and environment under the law. The goal of getting a good regulation that protects the health and safety of workers and students is almost submerged by the desire to produce a regulation by consensus." While he signed the proposed rule on behalf of himself and the center, he said that he is now "somewhat uncomfortable with the compromises made" and that the comments submitted by his organization, under the retained right to comment after signing the consensus statement, were "scathing" insofar as they called for much clearer and unambiguous guidance from EPA. He concluded that "while the process promises a valuable forum, we need to tinker with the primary goal of compromise above all."

Margaret Zaleski, of the Public Protection Unit of the Massachusetts Department of the Attorney General and one of the late-seated parties, indicated a similar concern with the general process. While she was "impressed with the dedication of all the participants, and their real desire to reach the goal even when coming to consensus seemed impossible," she was nonetheless disturbed that the "process became more important than the substance."

## The Litigation Issue

Zaleski, who represents one of the plaintiffs in the pending lawsuits against the former manufacturers of asbestos, indicated dissatisfaction with the composition of the AHERA negotiating committee and its influence on the proposed rule. (She was one of the non-signers of the consensus document.) Reg-neg permits the regulated industry to sit on the committee: here, she said, the regulated industry is the schools that must deal with the asbestos in their buildings, not the manufacturers who no longer produce the product. While acknowledging that the process emphasizes inclusion of all interests, she questioned the appropriateness of taking "someone who is potentially liable for past actions and allowing them to sit at the negotiating table and determine which of those past actions may give rise to liability and the extent of that liability."

William Lewis, one of the representatives of the former manufacturers, disagrees. He stated his doubts that "any serious argument can be put forth as to not having all interests represented," and stressed that "there was a sense of working toward a common end, notwithstanding the differences." Although his client is involved in asbestos litigation other than that brought by the school districts, it is represented in that litigation by another office of his law firm. He himself is not a personal injury litigator, but an environmental lawyer with a background in regulatory issues. His client made "a specific decision" as to the kind of person and expertise it wanted at the negotiating table, he said; it felt that "as a practical matter, if it tried to carry forward litigation in the regulatory process, it would be counterproductive and not consistent with the mandate to work toward consensus."

> *"While the process promises a valuable forum, we need to tinker with the primary goal of compromise above all."*

Paul Schur, of the Connecticut Department of Health, signed the rule as an individual, but not as a representative of his state. He indicated that the state elected not to sign because of the attorney general's "minor concern" that its position in asbestos litigation now or in the future might be affected. "It will be interesting to see how the relationship between litigation and signing a proposed rule develops," Schur said; "if it turns out not to present a problem, the value of reg-neg will be increased." Schur has previously used negotiation to develop a state regulation.

## Time Constraints

Most of the participants interviewed felt that the extremely tight deadlines imposed by the statute made this reg-neg particularly difficult. Paul Schur suggested that "when the science involved in an issue is not that solid, extra time should be allowed for developing the technical base for people," and stated that "there was not really enough time at the end to wrap up." Margaret Zaleski also stated that the technical nature of the issues was particularly difficult given the time factor, and indicated that future pre-negotiation training might offer a technical component for those who feel in need of it. More time would have permitted the committee to get closer to consensus than it did, she said, even if it never reached consensus on all issues. Here, the most difficult and unresolved issues were deferred to the last hour.

While Brian Christopher was not convinced that more time would have helped to resolve the substantial differences among the parties, he noted that the short timeline was particularly difficult for organizations that "didn't have vast resources." Absorbing all the material generated from meeting to meeting and evaluating the proposed compromises to see if they were "useful or onerous" required tremendous work, he said.

## Facilitators' Observations

At first blush, the major difference between this reg neg and others conducted by the EPA was the deadline, according to Kathy Tyson, deputy director of the agency's Regulatory Negotiation Project and executive secretary of the AHERA negotiating committee. As the negotiation progressed, however, other elements turned out to be influential, she said, including: the working relationships among many of the participants established during the development of the AHERA legislation; the litigation by the school districts to recover the costs of asbestos abatement from the former manufacturers; and the inclusion of new participants half-way through the negotiations. Tyson also pointed out that there was a disparity between the operating framework of those who had been a part of the covening and training phases of the process and those who entered halfway through the negotiation. These influences notwithstanding, the good will among the parties here was "outstanding," Tyson said.

The nature of the proposed rule and the accompanying statements supporting the agreement reflected the circumstances of the negotiation. These circumstances required committee members to sign off on the documents on nearly the same day they reached agreement, according to Tyson, and the resulting constraints on members in checking back with their organizations made them uncomfortable. The participants dealt with this pressure by agreeing to support the document as a *proposal* and by expressly retaining their rights to comment fully after its publication in the Federal Register. This is much more open-ended than some of the previous consensus statements growing out of EPA reg negs. Tyson emphasized that there is no single "appropriate" form for such statements.

## Overcoming Built-in Obstacles

Three primary factors made it possible for the committee to come up with what it considered to be a satisfactory proposal, according to Leah Haygood, a Conservation Foundation staff member who served on the facilitation team. First, the EPA asbestos program office provided draft documents on which work could build, so that people could respond without starting from scratch. Second, most of the members had worked on the issues before, in connection with previous programs or during the development of the legislation. Finally, it was agreed from the outset that the committee would not try to negotiate certain items on which it was unlikely to agree: for example, acceptable levels of asbestos exposure (it was to be assumed that any exposure is dangerous), and what types of monitoring could be used.

One particularly difficult feature of the negotiation, she said, was the large number of people involved. There was an active mailing list of 90 people who received materials and participated in work groups on behalf of the named representatives on the committee. Keeping track of this large number of people was a logistical challenge.

> *"Defining consensus is an area in which federal agencies are still feeling their way."*

The differences in negotiating styles and experiences among those at the table was striking and sometimes produced confusion, Haygood remarked. Some participants, such as the union representatives, were familiar with negotiation in other contexts and experienced in give-and-take. Others were not as comfortable making tentative proposals and counter-proposals to move toward agreements. As a facilitator, the task was to bridge these different negotiating norms and styles; she said that this involved such techniques as naming the misunderstanding, or encouraging a participant without a major stake in a particular issue to propose a common ground on that issue.

## The Nature of Consensus

The leader of the facilitation team, Owen Olpin, who previously headed the committee of the Administrative Conference of the U.S. that recommended federal agency use of negotiated rulemaking, indicated that defining "consensus" is an area in which agencies are "still feeling their way." Here, the goal was a unanimity of the interests represented at the table, and this wasn't achieved in pure form. Nonetheless, he said, those involved would characterize the negotiation as successful. Future rulemakings might lead to different definitions of consensus on an ad hoc basis, he suggested. For example, an impasse might be declared as to an issue that can't be resolved, and that issue might be removed from the table.

Although he observed that from the beginning, EPA was forthright as to the issues for negotiation, Olpin also noted that the "committee took on a life of its own." Several of the issues identified by the agency as being outside the scope of the negotiation remained outside, but at least one — the accreditation of asbestos abatement contractors — was perceived by some committee members as so fundamental to the operation of the rule that they addressed the issue.

## Participants and the Rule

After EPA published the proposed rule, many of the participants in the negotiation submitted comments; their reactions to the substance of the rule reflect divergent views. For example, the Safe Buildings Alliance, which signed the consensus statement, faulted the proposed rule for overestimating the risks of asbestos in schools and failing to prescribe appropriate abatement measures. While the negotiated rulemaking process was useful, SBA said, it "cannot substitute for analysis and development of precise standards" for acceptable levels of asbestos exposure and asbestos abatement. The comments note, however, that "for certain procedural issues, the negotiations led to reasonable proposals."

The National Education Association, which also signed the consensus agreement, commented that it is "not fully satisifed" with the proposal and believes "substantial changes" will be needed in the final rule. It is "particularly concerned," the comments said, that the proposed regulations permit school districts to select their asbestos abatement actions "on a 'cost' rather than a 'health' basis." EPA "should use its technical expertise to provide clearer guidance regarding the selection of appropriate response actions" and stricter timetables.

The National Association for Independent Schools limited its comments to those issues on which EPA specifically requested comment. It commended the EPA "for using the regulation negotiating process to gain consensus among groups that have widely disparate interests in the implementation of the Asbestos Hazard Emergency Response Act," and stated its satisfaction that "the regulations as issued represent a reasonable compromise."

One of the interests that opted not to sign the consensus agreement, the Massachusetts Department of the Attorney General, criticized both the proposed rule and the reg-neg process. The process had two major structural flaws according to the comments: a too-short time period and inclusion of former asbestos manufacturers at the negotiating table. It resulted in regulatory language that "in many instances is either technologically unsound or so open-ended and non-directive as to be meaningless."

## The EPA's View

EPA, in the preamble to the proposed rule, explained its decision to use the results of the process as the basis for the proposal. While there was disagreement among committee members as to how to implement all provisions of the rule, the agency concluded that "these differences are all within a general zone of reasonableness that may be appropriate for regulation. The proposed rule is also within that zone of reasonableness."

It also observed that "No party achieved all the goals it would have liked, but each party gained substantial concessions." In the typical process, it said, contentious issues are resolved "only after long regulatory and judicial proceedings," after which the litigants may be forced by the courts to negotiate anyway. "By moving the negotiations to the beginning of the process, EPA has hoped to avoid the long delays inherent in the normal process."

# Building a Consensus: Agencies Stressing 'Reg Neg' Approach

## The EPA's highly touted strategy of regulatory negotiation has proved disappointing as a tool for resolving two major issues. Certain aspects of the process need to be rethought.

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**BY RENA STEINZOR**
**AND SCOTT STRAUSS**

In an era of deregulation, one of the most fascinating recent developments is the Reagan administration's embrace of regulatory negotiation, or "reg neg" for short. Faced with a tenacious public-interest community that would rather sue than switch, the battle against burdensome regulation has shifted from outright combat to a propaganda campaign for consensus through negotiation with the potential enemy.

In the forefront of the reg neg craze is the Environmental Protection Agency which, with scarce resources and a workload of some 200 rule-making proposals, has a strong interest in finessing as many controversies as it can.

Reg neg is well on its way to becoming a sacred cow in Washington. A speaker who expresses anything short of effervescent enthusiasm is suspected of prolonging controversy for personal gain. At a recent colloquium sponsored by the Administrative Conference of the United States, EPA Administrator Lee Thomas announced that negotiated rule-making is now "part of the institutional fabric" of his agency.

The Administrative Conference moved to center stage as an administration supporter of reg neg when it passed Recommendation No. 82-4, urging agencies to consider negotiation for the purpose of drafting the text of proposed regulations. The Administrative Conference and others believe that once a "consensus" on the text of a proposal is reached by major interest groups, the proposed rule will generate little negative comment and can then be promulgated without a legal challenge.

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*Rena Steinzor is of counsel and Scott Strauss an associate at Spiegel & McDiarmid in Washington, D.C. Steinzor is a former staff counsel to the House Energy and Commerce Subcommittee on Commerce, which had jurisdiction over the Environmental Protection Agency programs discussed in this article. Strauss represented the Service Employees International Union in the EPA regulatory negotiation concerning asbestos in schools. The opinions expressed in this article are those solely of the authors.*

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## Signs of Trouble

Despite this unbridled optimism by negotiation proponents, there are definite signs of trouble on the horizon. After successful negotiations of several minor rule proposals, the EPA reg neg program then took on two of the agency's most intractable controversies: cleanup of asbestos in the schools and standards for deep-well injection of hazardous waste.[1]

The asbestos reg neg ended with an uneasy truce that is on its way toward unraveling as the rule-making process continues. The deep-well reg neg fell apart at the 11th hour. Both situations indicate what types of reforms are needed if reg neg is to succeed over the long haul.

At the center of the debate is the appropriate role of the agency whose rules are being negotiated.

It is now standard practice in reg negs for the agency to assign a senior official to sit at the table and bargain on an equal footing with all other participants, and as a major incentive to bring outside groups to the negotiating table, EPA negotiators commit to propose whatever deal is cut. Rather than focusing on their own statutory responsibilities to protect the welfare of the public and the environment, agency negotiators, aided by a phalanx of professional facilitators and mediators, seek to avoid litigation by identifying a regulatory "deal."

The substance of such deals must therefore accommodate the most extreme ends of the interest-group spectrum. Ultimately, the agency is reduced to little more than a regulatory real-estate agent, whose true client is neither the buyer nor the seller, but the deal that can be struck between them.

The "real-estate agent" approach to negotiation taken by the EPA raises substantial questions about its commitment to complying with increasingly rigorous pro-environmental federal laws that reduce the agency's discretion as much as possible.

As practiced by the EPA, reg neg is not a process in which the agency delegates the drafting to an advisory committee and retains ultimate authority over the content of the rule. Rather, as the asbestos and deep-well negotiations show, the EPA's approach is to commit in advance to propose whatever is agreed to, irrespective of its statutory mandate. In other words, the agency offers to ignore its statutory obligations in an all-out campaign to promote consensus.

In fact, as the case studies also show, it is not even clear that the agency's willingness to sacrifice its statutory responsibilities to foster a negotiated compromise always helps the consensus process. The attitude of the EPA—that what matters is the deal rather than the mandate—serves to infuriate, rather than to encourage, those groups that believe strict compliance with statutory requirements is essential to their interests.

Another problem on the horizon is the growing realization by public-interest groups that the process consumes more resources than its results justify. Until the EPA and other agencies face this issue, public-interest groups will pull back from negotiations that cannot credibly occur without them.

The exalted status of reg neg—few have dared to voice even muted criticisms, much less suggestions for change—is undoubtedly due in part to the growth of a professional negotiation industry.

But if this new community of negotiation entrepreneurs, including mediators, convenors, facilitators, and full-time agency reg neg personnel, is to survive, they must tone down their missionary fervor and start listening more carefully to dissident voices. The asbestos and deep-well cases contain a multitude of lessons for those committed to making reg neg a fixture and not a fad.

## The Asbestos Mess

The question of what should be done about asbestos-containing materials in public and private school buildings has dogged the EPA for the better part of the last decade.

After hearings in both houses of Congress on the inadequacies of the agency's "voluntary" asbestos-in-schools program, legislation was introduced to force the EPA to promulgate specific regulations that would tell local education agencies—i.e., public and private school operators—what to do and when to do it, and to provide for the accreditation of "experts" to perform necessary work.

On Oct. 22, 1986, President Reagan signed the Asbestos Hazard Emergency Response Act of 1986 (AHERA).[2] AHERA obligates the EPA to issue regulations requiring that local education agencies inspect school buildings, assess the condition of asbestos-containing materials, plan and properly perform appropriate response actions to abate asbestos hazards, and safely dispose of asbestos waste.[3]

AHERA mandates swift administrative action. The EPA must propose rules within six months, by April 1987, and promulgate final regulations within one year, by October 1987. AHERA also contains a formidable "hammer" provision: If the EPA fails to meet the statutory deadlines, the agency's most recent asbestos "guidance" document takes effect as a statutory requirement until and unless superseding regulations are promulgated.

The number and breadth of issues to be addressed and resolved in drafting these regulations is enormous.[4] Faced with a

> Under the EPA's concept of reg neg, the agency is reduced to little more than a regulatory real-estate agent, whose true client is neither the buyer nor the seller, but the deal that can be struck between them.

lengthy, complicated agenda and a near-suicidal time frame in which to issue a proposal, the EPA decided not to face the music alone.[5]

In January 1987, the EPA held a reg neg organizational meeting, at which those groups identified by an EPA "convenor" as having an interest in asbestos regulations were given an opportunity to inform the agency of their views on the usefulness of an asbestos reg neg.

The participants ranged from organizations like the Service Employees International Union, the National PTA, and the National Education Association—all of which had fought for passage of the legislation—to the school officials responsible for implementing it, to former manufacturers of asbestos products who fear they will foot the bill for cleanup costs.

At this session, several public-interest representatives expressed some reservations about the process, arguing there was too much to do in too little time and that because industry had far more staff and financial resources, it had the capacity to swamp the negotiations.

EPA negotiation experts sought to allay concerns that public interest organizations would be trampled by herds of industry experts, and that the massive amount of work to be done in little more than two months would be too much for the committee to address.

According to these experts, no participant had anything to fear from reg neg because each representative had the right to refuse to agree to those portions of the rule that it did not endorse, and the EPA would propose only those portions on which there was group consensus. The portion on which there was no agreement would be drafted by EPA staff in the usual way.[6]

It became obvious early in the process that there were far too many issues for the full committee to address and resolve. The committee was split into three "work groups," each of which was given a portion of the regulation on which it would make recommendations to the full committee.

The work-group arrangement posed considerable problems for the participants from public-interest organizations, who, unlike industry, lacked sufficient staff and resources to participate effectively in the resolution of the complicated matters considered by each work group.

Over the next two months, many lengthy work-group and full-committee sessions were held in what at times appeared to be a near frantic attempt to reach consensus on the complex matters that the EPA itself had for several years been unable or unwilling to address in a regulation.

The work-group and full-committee sessions were structured to achieve agreements regardless of content. EPA negotiators did not attempt to resolve disputes by informing the committee members of what the agency, in applying its statutory mandate, would do with the issue. Instead, consistent with its role of "regulatory real-estate agent," the EPA consistently sought no more than to determine the "zone of compromise" between the schools, the unions, the environmentalists, and the industry, and to box the parties into it.

As the process wound down, many of the participants were unwilling to agree to major portions of the proposal and sought consensus solely on the less controversial items. These less controversial consensus items made up about 70 percent of the rule, but the remaining 30 percent concerned issues central to all the negotiators.

Just before the final set of committee sessions, the head negotiator for the EPA played a final wild card in the consensus poker game: The EPA informed the committee that absent agreement on a complete regulatory package, the agency could not guarantee that the Office of Management and Budget would approve those portions of the regulation on which there was consensus. The EPA claimed that the OMB could rewrite the entire proposal, thereby negating the gains that all the participants might have achieved during the negotiation.

The committee organizational protocols state that in those areas in which consensus is reached, the proposed asbestos rule will track the parties' agreement and that the remainder of the regulation will be drafted by the EPA. Having reached the end of the process, the EPA then informed the parties that such a partial consensus would be useless. This shift in the EPA's position left some parties on all sides of the issue with little choice but to refuse to agree to anything. EPA negotiators nonetheless pressed vigorously for some kind of general consensus.

The EPA ultimately proposed a solution that would end the reg neg on a positive, conciliatory note, but leave all parties with sufficient maneuvering room to attack unacceptable portions of the proposal later. The agency suggested that committee members sign a consensus statement that would indicate support for publication by EPA of the complete proposal, but that would also explicitly retain for each signatory the right to comment, positively or negatively, on any aspect of the proposal and to challenge the final rule in court, if necessary.

The EPA thus requested that the parties sign what appeared to be a meaningless document. Paradoxically, the agency claimed that the document would have great meaning: the OMB would approve the proposal, and the EPA would be able to claim yet another reg neg success.

Many, but not all, of the public-interest organizations chose to sign the consensus statement. Some who signed made clear that in so doing they were not agreeing to allow the EPA to propose, let alone promulgate as a final regulation, those portions of the proposal they believed violated AHERA.

Industry representatives signed the statement, while simultaneously communicating to the EPA their reservations about the "compromises" reached. The EPA, for its part, subsequently proposed the entire regulation, highlighting the importance of the consensus.

Meanwhile, many participants filed comments on the rule-making proposal that not only alleged that the proposal was illegal under AHERA, but sought to dispel the agency's rosy view of the reg neg process and its outcome. House and Senate authors of the law wrote letters to the EPA similarly condemning central aspects of the proposal. These reactions make clear that the regulatory real-estate agent must now show the parties another property or risk losing the sale.

### The Deep-Well Controversy

More than 10 billion gallons of liquid hazardous waste is injected into deep wells each year. Thousands of feet underground, huge subterranean caverns hold vast quantities of toxic liquids that, according to industry advocates, will retain their structural integrity indefinitely and provide a relatively cheap, efficient alternative to placing such substances in landfills.

But environmentalists are not so sure that deep-well injection is either a safe or permanent disposal method. Because the consequences of a burst well are unthinkable, especially if the failure occurs near a major source of ground water, and because it is technologically impossible to retrieve the wastes, this disposal method has become increasingly controversial.

In 1984, Congress took a tough stand on the future of deep wells by passing the Hazardous and Solid Waste Amendments (HSWA) to the Resource Conservation and Recovery Act.[7]

The HSWA gives the EPA no alternative but to regulate comprehensively on the subject, stating that by Aug. 8, 1988, the agency must promulgate regulations determining whether and how certain categories of hazardous waste can be safely injected into deep wells.

The act provides that if the EPA fails to take action, deep-well injection of those categories of waste is automatically banned, although the EPA can grant a variance extending the deadline for a two-year period. For companies dependent on deep wells, the fall of this legislative hammer would mean the loss of the deep-well disposal method and billions of dollars in new costs for more expensive disposal alternatives.

A stringent EPA regulation setting restrictive standards would have an equally drastic effect on the individual companies whose wells were disqualified under the new requirements.

With the HSWA clock ticking loudly, the EPA convened a regulatory negotiation on July 30, 1986. Seventeen committee representatives were chosen representing a broad spectrum of interests, from industry to affected state regulators to representatives of environmental organizations. All entered the process warily, as industry and environmental representatives bore the additional burden of years of distrust and acrimony on hazardous waste issues.

While no party could risk ignoring the negotiations, each side approached them from a different perspective. The environmentalists had fought hard to win a substantial legislative victory only two years earlier; their biggest downside risk if the reg neg collapsed was a bad rule from the agency. But as industry saw it, if the reg neg initiative failed, the EPA did not otherwise take timely action, and the hammer fell, the results would be catastrophic.

One disturbing omen from the environmentalists' perspective was that, unlike in the asbestos rule, the EPA did not promise

The environmentalists' biggest downside risk in the deep-well reg neg was a bad rule from the agency. But as industry saw it, if the initiative failed and the hammer fell, the results would be catastrophic.

to be bound by the results of the negotiations. Instead, the agency reserved its right to modify the deal prior to publication, and EPA negotiators acknowledged that any consensus proposal could be modified when the OMB reviewed the rule.

The agency's refusal to draw clear parameters for the sort of rule that could pass legal muster under HSWA, along with its noncommittal negotiating posture, left the environmentalists in what they soon began to see as a no-win situation.

After eight months of grueling work, with the committee nowhere near agreement on major issues, environmentalists walked out of the negotiations. Frustrated industry representatives accused them of negotiating in bad faith and essentially stalling the process until an impossibly short time remained in which to comply with the August 1988 deadline.

### Lessons for the Future

Today, with the benefit of hindsight, deep well reg neg veterans have several messages for future participants.

The reg neg collapsed over one central issue—application of HSWA's standard that permits "no migration" of wastes out of the injection zone for a "safe" deep well. Precisely because the no-migration standard was so important to all sides and was viewed by environmentalists as a potentially disastrous precedent for other rule-makings, the reg neg reached a point at which a major participant could not sign off without imperiling what it thought was its basic institutional effectiveness.

This meant that the reg neg failed to meet a primary criterion for selecting candidates for a successful reg neg—that "no party will have to compromise on an issue fundamental to its existence."[8]

The EPA's "honest real-estate agent" performance was another roadblock to completion of the negotiation. The agency refused to commit itself substantively or procedurally, leaving increasingly frantic participants to play a guessing game on how the EPA staff would come out if left to their own devices.

Industry apparently felt optimistic about its chances with the agency and remained at the negotiating table. Environmentalists were more pessimistic, especially in light of the EPA's revelation that OMB could well modify the deal after the fact. When added to conflicting incentives to meet or miss the statutory deadline, the uncertainty about the EPA's real agenda produced an implosion of the negotiating process.

Finally, as was the case in the asbestos reg neg, the deep-well negotiation raised the underlying issue of whether the public interest community can afford to participate in a process that requires such organizations to make a staggering resource commitment.

Three of five professional staff members of the Natural Resources Defense Council's Toxics Project ended up working virtually full time on the reg neg during its last heated weeks. Although deep wells were perceived as an important issue for the group, it was forced to let many other important regulatory developments drift by.

The environmentalists' frustration was compounded by the realization that participating in a traditional rule-making—in which the EPA was left both to make and to document the tough choices—would have consumed a fraction of the resources they were forced to devote to reg neg.

The agency clearly likes the negotiation process because it helps conserve scarce government resources by shifting much of the burden for researching and developing regulatory alternatives to private participants. But transferring the burden to an overworked environmental community, without some form of public funding, is surely not equitable, and, as a practical matter, may not be possible.

### Conclusion

Administrative agencies are required by statute to make the tough, complicated regulatory choices necessary to safeguard public and environmental health in an industrial age. On issues of health and safety, Congress has become increasingly concerned about the agencies' will to govern aggressively, and it now routinely enacts highly specific laws that give agencies little discretion to avoid taking strong action.

Through the use of reg neg, administrative agencies like the EPA can effectively turn their backs on their statutory mandates. In the immediate interest of sparing themselves court challenges, such agencies try at times to cajole warring outside interest groups into signing off on compromises that are not legally, much less technically, appropriate.

If such agencies as the EPA ever hope to persuade Congress to reverse the trend toward specific, restrictive statutes and to return more administrative discretion to them, they must be wary of embracing a negotiation process that cannot help but leave the impression with Congress that the agencies are unwilling to take charge of their destinies. The asbestos and deep-well experiences highlight several areas for immediate improvement.

First, agencies utilizing reg neg must inform negotiation committees from the outset that committee agreements will become proposed regulations only to the extent that they conform with the agency's statutory obligations.

Throughout the negotiation process, agencies should make the parties aware of agency positions on disputed matters, so that the negotiators can determine how much should certain positions and proposals be pushed. In essence, agencies should use their reg neg committees as advisers, rather than as authors of regulatory proposals.

Second, agencies must structure negotiation agendas so as to avoid placing before the participants issues on which they are unable to compromise. The presence of such matters in the negotiations may lead to an impasse. Non-compromisable questions should be faced and resolved by the agency. At the least, should such questions be put to the committee, the agency should stress that partial consensus on the remaining issues is in fact a viable option.

Third, the resource issue must be faced and resolved. Negotiated solutions gain credibility and legitimacy to the extent that all affected interests are represented at the committee table. Funding must be made available to ensure that public-interest organizations are present and accounted for throughout the reg neg process.

Adoption of these proposals will help ensure that future reg neg experiences culminate in useful solutions to, rather than useless battling over, important regulatory dilemmas.

[1] The Environmental Protection Agency has engaged in seven regulatory negotiations. Apart from the two projects discussed in this article, four others were successful and one failed.

The four successful projects involved: (1) nonconformance penalties for manufacturers of heavy-duty trucks or other vehicles under the Clean Air Act (CAA), 42 U.S.C. §7401 et seq.; (2) wood-burning stove air emission standards, also under the CAA; (3) minor permit modification standards under the Resource Conservation and Recovery Act, 42 U.S.C. §6901 et seq.; and (4) emergency pesticide exemptions for federal and state agencies under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §136 et seq. An attempted negotiation of farm-worker protection standards, also under FIFRA, failed to reach "consensus" because the farm workers walked out before the negotiations were completed.

[2] 15 U.S.C. §2641 et seq.

[3] AHERA §203, 15 U.S.C. §2643.

[4] Although Congress had resolved most of the tough policy issues for the agency, it left to the EPA the job of drafting clear, specific instructions for cleaning up the approximately 30,000 school buildings estimated to contain asbestos hazards. The regulations must describe what to do when faced with asbestos-containing materials in virtually any conceivable condition.

[5] Both the tight statutory schedule and the presence of what some industry groups regarded as a potentially disastrous "hammer" led to the selection of this rule-making as an ideal reg neg candidate. *See* Consideration of Establishing an Advisory Committee to Negotiate Proposed Regulations Implementing the Asbestos Hazard Emergency Response Act (AHERA) of 1986, 52 Fed. Reg. 1,377 (Jan. 13, 1987).

[6] EPA personnel claimed repeatedly at the organizational meeting that the regulatory negotiation process was akin to visiting a "custom tailor"—i.e., that the participants could tailor the process to achieve partial or total consensus. Indeed, at the first meeting of the asbestos negotiating committee, the committee's organizational protocol was discussed and modified to state that

> The goal of the Committee will be to produce a preamble and rule ready for publication in the *Federal Register*. EPA will use the consensus reached in these negotiations as its notice of proposed rulemaking. To the extent the parties do not reach consensus on all issues, EPA will draft a notice of proposed rulemaking consistent with the agreement that is reached. EPA Asbestos Regulatory Negotiation Committee Organizational Protocols at 1, Article II.

[7] 15 U.S.C. §6924(f), (g), and (h).

[8] Philip J. Harter, *Regulatory Negotiation: An Overview*, Dispute Resolution F., Jan. 1986, at 4.□

LEGAL TIMES

AUGUST 10, 1987

# Agency Reg Neg No Disappointment

To the editor:

The authors [Rena Steinzor and Scott Strauss] of "Building a Consensus: Agencies Stressing 'Reg Neg' Approach" (*Legal Times*, Aug. 3, 1987, page 16) evaluate regulatory negotiation as a "sacred cow" that is a disappointment. Disappointment to whom? The vast majority of participants in negotiated rulemakings, including environmentalists, express strong support for the process and the results. Simply, the authors' sweeping criticisms are inaccurate and unsupported. Their specific procedural suggestions make sense and are important components of the existing reg-neg process. However, the authors fail to note that all are contained in recommendations of the Administrative Conference of the United States (ACUS), adopted in 1982 and 1985. . . . ACUS believes that reg neg, when used selectively and carefully, has value to agencies, industry, and the public.

The authors' criticism of reg neg, based on EPA's asbestos and underground injection proceedings, stems from a mischaracterization of the agency's role in the process. Serious proponents of reg neg do not contemplate that the agency abdicate responsibility for statutory compliance. If negotiators' proposals stray from legal requirements, the agency's representative should not agree to them. While the conference recommended that agencies publish proposed rules resulting from reg negs, our recommendations make clear that agencies retain ultimate responsibility and should not propose agreements that violate the law.

The authors' first conclusion—that an agency must keep negotiators aware of its position on disputed matters so that negotiators can continually reassess their own positions—was emphasized by ACUS in 1985. Participants must have realistic expectations about what the agency will do if no consensus is reached.

The authors write disparagingly of attempts to push toward consensus in the asbestos proceeding because of the tight time frame imposed by Congress. As both litigators and negotiators know, a fixed deadline can be helpful to fostering agreement. If the deadline was unrealistic in this case, this was unfortunate, but it is not a flaw in the reg-neg process.

When potential parties to a proceeding prefer to have no consensus, reg neg is inappropriate and will not work. But if proceedings are chosen carefully and conducted in a spirit of cooperation and good will, the long-run benefits in terms of savings from avoided litigation and better, more acceptable rules, can be substantial.

**Marshall J. Breger**
Chairman
Administrative Conference
of the United States
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# ‘Reg-Neg’ Revving Up in D.C.

BY MARIANNE LAVELLE
National Law Journal Staff Reporter

THERE IS a momentary truce in the great war over where to dump the nation's high-level radioactive wastes. Enemies in the exchange over this deadly material get together for a couple of days each month, put aside their legal weapons and sit at a bargaining table to negotiate the rules that will govern their ultimate fight.

In essence, this committee of environmentalists, American Indians and federal, state and industry officials will tell the Nuclear Regulatory Commission (NRC) how to run its hearing on licensing the first high-level nuclear waste site in the United States. Although they disagree on many things, they have agreed at least the waste dump question eventually will be answered and litigation over the hearing process will not advance the cause of either side.

For the NRC, bringing together the warring factions is an experiment and ideal test case for a much-in-vogue method for making federal regulatory agency rules. Called regulatory negotiation — reg-neg in bureaucratic shorthand — it is a way to avoid a lot of litigation as adversaries who are likely to sue negotiate their differences long before a regulation is issued.

The agencies boast, for example, that reg-neg in the past four years has helped them quickly produce successful pollution standards for wood-burning stoves and airline pilot work rules. The measure of success? The regulations have not been challenged in court.

With some agencies stymied by lawsuits on most of the major rules they write, it's easy to see why they are turning to the process billed as "fair, prompt and less litigious" by the National Institute for Dispute Resolution (NIDR), a promoter of court-avoid-

*Continued on page 21*

# More Agencies Use ‘Reg-Neg’ As an Alternative to Litigation

*Continued from page 1*

ance techniques. With the help of mediators from NIDR or the agencies, parties are invited to hammer out their differences in the negotiation room before a rule is published — rather than in the courtroom afterward.

But litigators accustomed to taking on the federal government needn't worry they will be driven out of business by the reg-neg trend. Lawyers who have participated in negotiations — both for industry and public interest groups — see reg-neg as suited only to a few, clearly defined issues about which participants are not in danger of compromising their fundamental values.

### ‘Buying Peace’

When used under the wrong circumstances, reg-neg can go awry, as some sessions have shown.

Political conflicts among parties can erupt and demolish negotiations, as they did two years ago when farm workers walked out on the Environmental Protection Agency's rule-making on pesticides. Growers say they felt trapped into compromises they had made to that point and were unable to negotiate further with the workers.

Mistrust of the agency also can inhibit negotiations. Former makers of asbestos products say the EPA — to avoid taking a stand — handed over to a committee of private parties the task of making rules on asbestos in schools. A suit they filed in January, right after the rules were published, became the first legal challenge to an EPA-negotiated regulation.

And safety, health and other issues industry or public interest groups view as fundamental have proven poor topics for reg-neg. The Department of Transportation, for example, was unable to reach a compromise on seating for blind passengers on airlines. What the advocates for the blind viewed as a fundamental right, the air carriers viewed as a safety threat.

But despite the risks, interest groups and industry are drawn into rule-making by one irresistible attraction. "You're not just buying the regulation," says Washington, D.C., sole practitioner Philip J. Harter, a former government lawyer and father of the reg-neg theory. "You're also buying peace."

### ‘Reality Therapy’

The first formal reg-neg in 1984 peacefully obtained a result few thought possible: revision of airline pilot work rules unchanged since the 1930s. After several years of trying, unsuccessfully, to write rules acceptable to industry and the pilots, the Federal Aviation Administration summoned them to the bargaining table. "We wanted to get the unions to see the consequences of these rules for the airlines, and we wanted industry to see the real concerns of pilots," says Edward P. Faberman, the FAA's acting chief counsel.

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# Use of 'Reg-Neg' Revs Up In Rule-Making for Agencies

*Continued*

In 1986, makers of wood-burning stoves jumped at the chance to get involved in development of emissions standards for their product, says David E. Menotti, lawyer for the Wood Heating Alliance trade organization. Mr. Menotti, of the D.C. office of Seattle's Perkins Coie, says reg-neg was a chance to explain their industry to the environmentalists and the EPA before their respective positions hardened.

"One of the problems in the traditional rule-making process is nobody's listening," Mr. Menotti says. "This is a priceless opportunity to pitch your wares to someone who is actively trying to understand you."

Introducing affected parties into the regulation process can bring new ideas to the agency. Robert C. Ashby, a transportation department counsel who handled recent negotiations on airline access for handicapped people, says the parties early on agreed that airline personnel be trained how to aid physically impaired passengers. That simple notion, Mr. Ashby says, "may or may not have been" considered in the agency's traditional cloistered rule-making process.

Chris Kirtz, the lawyer who heads the EPA's reg-neg project, says sitting down with industry and interested parties is "reality therapy" for agencies.

Mr. Harter came to the same conclusion while chairing a task force in the Ford administration to review Occupational Safety and Health Administration standards.

He began to believe regulations would be more widely accepted and easily enforced if the decision-making involved those affected by government decisions. He developed a plan for reg-neg in 1982 in a study for the Administrative Conference of the United States, the federal agency charged with making the regulatory process more efficient. Agencies already had a model for negotiated rule-making, Mr. Harter found: negotiations leading to settlement of lawsuits. Reg-neg puts the settlement at the beginning of the process instead of at the end.

**A Faster Method**

The usual route to rule-making can be both slow and contentious. Normally, an agency publishes proposed rules in the Federal Register, takes comments from the affected industry and other interested groups, and writes final rules. It takes the EPA three to five years to finalize its major rules. Then, the lawsuits roll in. Of the 200 to 300 final rules the agency publishes each year, about 80 percent are challenged in court. Not coincidentally, EPA Administrator Lee M. Thomas has taken the lead in use of reg-neg.

In a typical reg-neg, between 10 and 25 people — industry and interest group representatives, with or without their lawyers — sit around a U-shaped table. The negotiation committee meets once a month for about six months. The sessions are open to the public under the Federal Advisory Committee Act.

Because reg-neg involves parties who typically are adversaries, political conflicts among them sometimes cannot be overcome at the bargaining table. The EPA blames animosity between growers and farm workers for the collapse of talks on pesticides in the fields. And Mark A. Maslyn, assistant director of the National Farm Bureau, says he feels his growers organization was put at a disadvantage through the process.

When the EPA publishes final rules next month, Mr. Maslyn believes they essentially will incorporate the agreements reached when the workers walked out. The growers had not felt the negotiations had gone far enough.

"We sat in amazement at this collapsing around us," he said. "There was a great deal of anger at the nights and weekends spent on this damn thing."

Sometimes, parties and the agency cannot agree on ground rules for negotiations. The former makers of asbestos products think the EPA should set standards for safe levels of asbestos in the schools. The manufacturers argue new studies show that removing asbestos, even when done carefully, can raise levels of the cancer-causing substance in the air. Because of the lack of a government standard, they say, schools have been relying on asbestos-removal contractors to determine when to remove the material.

In setting up the reg-neg, the EPA said it did not want to set a numerical asbestos safety standard, but would leave decision-making in the hands of schools. But industry representatives say setting levels is precisely what lawmakers wanted the EPA to do. The agency now is facing precisely the situation it hoped to avoid in setting up a reg-neg.

"EPA has in effect thumbed its nose at Congress," said the former asbestos product makers in their lawsuit filed in January in the U.S. Circuit Court of Appeals for the District of Columbia. *Safe Buildings Alliance, et al. v. U.S. Environmental Protection Agency*, 87-1069.

**Some Don't Work Out**

Even in less contentious cases, some issues cannot be resolved. A Department of Transportation reg-neg committee was able to work out proposed rules for making airlines accessible to the handicapped on all issues except the seating of blind passengers. Advocacy groups believed blind passengers had a right to be seated near exit doors but the FAA and airline argued this would endanger passengers.

"One group was insisting this was a matter of discrimination and was literally analogous to putting blacks at the back of the bus," says Mr. Ashby, counsel for the DOT. "And the FAA and the air carriers were arguing this was a safety issue which could not be compromised."

Some critics feared reg-neg would force parties into dealing away their values. But in the airline case and others, parties have simply refused to engage negotiations they felt might compromise their principles.

Being co-opted remains a worry, says David D. Doniger, senior attorney for the Natural Resources Defense Council, which has represented environmentalists in several reg-negs. "You cannot walk into the process without knowing what you're about and what's not acceptable to you," he says. He believes, however, that agencies and parties have generally avoided negotiations on issues that would cause either side to feel it has sold out.

A more practical worry also has limited use of reg-neg. Negotiations take time and a commitment of resources unrewarded by the attorney fees normally gained from successful litigation.

Mr. Doniger is one of those attorneys calling for a government pool to help fund public interest group involvement in reg-negs. Without funding, the groups may find it more difficult to negotiate than to pursue litigation.

Because of all the potential pitfalls, agencies generally are choosy about items for negotiation. Even the EPA, leader in the reg-neg cavalcade, has only tried negotiation on seven rules. The EPA says it picks only items with a limited number of related issues, and ones of interest to a relatively small number of identifiable parties expected to show good faith in negotiating. The agency also has found that a deadline spurs negotiations.

**Good Item**

The NRC thinks it has picked a good item for its first negotiated regulation the rules for setting up a $150 million computer system to hold documents for hearings on the high-level nuclear waste site.

In December, after a search that began more than a decade ago, Congress said the federal government should study placing the site in Nevada. It is estimated there are 10 million documents, averaging five pages each, related to the case. The NRC estimates it can cut the licensing hearing process in half — from nine years to four years — by using a computer.

"In Washington, negotiated rulemaking is being presented as the best thing since sliced bread," says NRC Counsel Francis X. Cameron. "When we looked at it, we said, yeah, but you've got to pick your areas carefully."

Because the NRC has never used such a computer system before, the agency felt it could benefit from a consensus on the design of the system, what documents should be included, how to deal with privileged documents and how to penalize those who do not comply with the rules. Essentially, Mr. Cameron says, the committee is setting the rules for discovery in the case.

"Emotions surround the high-level waste situation, and that comes out in the negotiations," Mr. Cameron says. Among the key issues are whether the system will be credible and tamper-free. Because the Department of Energy actually will be choosing the site, environmentalists and state government representatives have argued at the table they don't want the DOE to control the system. "They feel that would be tantamount to the fox guarding the henhouse," Mr. Cameron says.

But whether they oppose or support development of the nuclear waste site, all the affected parties want an accessible computer system, he says. That gives the groups a solid basis for negotiation.

"A lot of people feel this is one of the most positive things going on in the high-level nuclear waste area," Mr. Cameron says. "People are listening seriously to what others have to say."

Not all combatants can be lured into solving their problems at the negotiating table, however. In environmental reg-negs, Mr. Doniger of the Natural Resources Defense Council points out that industry, in effect, is being asked to come to the table to deal itself a heavier regulatory burden. Industry is unlikely to do this unless compelled by self-interest. The wood-burning stove manufacturers, for example, foresaw the states weaving a patchwork of differing regulations unless they helped the EPA created blanket federal rules, Mr. Doniger says.

Acid rain, on the other hand, is an example of an issue that can't be resolved by reg-neg, says the environmental group advocate. He says numerous discussion groups — including representatives of environmental groups and the utilities blamed for acid rain pollution — had the potential to grow into a negotiation group on regulation. This has never happened, Mr. Doniger says, because the utilities officials now see more advantage in fighting than in dealing.

"If reg-neg always succeeded, something would be wrong," Mr. Doniger says. "It will remain a fringe tool, used here and there, in the right circumstances. But you don't get all problems to go away by talking until you're blue in the face. In some battles, the only respectable outcome is a clear win."

**Regulatory Negotiation**

## Despite Impasse, Parties Praise DOT's Non-discrimination Reg-Neg

*Negotiations to develop a proposed rule to ensure that all air carriers treat handicapped persons in a non-discriminatory manner consistent with safety ended in an impasse. However, the five months of negotiations between government agencies, organizations for the handicapped, and air carriers provided the Department of Transportation with valuable information for drafting its proposal.*

The Department of Transportation recently concluded negotiations to develop a proposed rule to implement the Air Carrier Access Act of 1986, PL 99-435, amending 49 USC 1374(c), which requires DOT to promulgate regulations to "ensure non-discriminatory treatment of qualified handicapped individuals consistent with safe carriage of all passengers on air carriers."

After five months, the negotiations were called to a halt when the representative of the National Federation of the Blind walked out of a negotiation session. An impasse had developed over the issue of the applicability of the airline industry's exit row seating restrictions to blind passengers. At the time of the impasse, the participants had not reached a consensus on all provisions of a proposed rule. However, agreement had been reached on many important issues, according to DOT's Assistant General Counsel for Regulation and Enforcement, Neil Eisner, and Deputy Assistant General Counsel Robert C. Ashby. More importantly, despite the lack of consensus, DOT, the mediators, and with one exception, all of the participants interviewed by BNA, agreed that the process was valuable.

### What the Meetings Achieved

Total consensus is not necessary to a successful regulatory negotiation, according to Eisner. Because this regulatory negotiation involved "very contentious, complex issues . . . it was not appropriate to expect a total consensus," Eisner said. However, a "substantial narrowing" of the issues did result from the regulatory negotiation to form "70 percent of the basis" for a proposed rule, according to Ashby, who is preparing the notice of proposed rulemaking. DOT will now develop a proposal using the information obtained during the negotiations, and Ashby anticipates that the notice of proposed rulemaking will be issued this spring.

*"Matters of principle can't be solved with regulatory negotiation."*

Most of the participants agreed that the regulatory negotiation process should result in a fairer, more workable rule than would be produced through traditional notice and comment rulemaking. The regulatory negotiation process is better than the traditional rulemaking process because "the regulatory negotiation belongs to the parties—it is their process," said chief mediator Eileen Hoffman.

Hoffman, as well as participants Walt Coleman, representing the Air Transportation Association of America, Ed Driscoll, representing the National Air Carrier Association, and Diane Kirkpatrick, representing the Regional Airline Association, agreed that although a consensus was not reached, the exchange of information among the different interest groups was beneficial. The regulatory negotiation was valuable "from an educational standpoint. . . . It's a ready medium for knowing the positions of all the parties," said Driscoll.

### Background

**Statutory Authority.** Regulations prohibiting certified and commuter air carriers from discriminating on the basis of handicap were originally promulgated in 1982 by the Civil Aeronautics Board (14 CFR 382). These regulations were issued under § 504 of the Rehabilitation Act of 1973 (29 USC 794), which prohibits discrimination on the basis of handicap in federally assisted programs. CAB applied the provisions of these regulations containing specific requirements for service to disabled passengers only to carriers that receive a direct federal subsidy.

The Paralyzed Veterans of America brought an action in the U.S. District Court for the District of Columbia against CAB, arguing that all provisions of the regulations should apply to all air carriers. Non-subsidized air carriers, PVA argued, receive significant federal assistance in the form of FAA air traffic control services and airport and airway improvement grants.

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The district court agreed with PVA. However, on appeal, the U.S. Supreme Court reversed, holding that non-subsidized carriers are not covered by § 504 of the Rehabilitation Act, and therefore, are not covered by the regulations. In response to the Court's decision, Congress enacted the Air Carrier Access Act of 1986 (PL 99-435, amending 49 USC 1374(c) ), which prohibits discrimination on the basis of handicap by all air carriers. The Act also directs DOT to promulgate implementing regulations.

## Request to Use Process

Shortly after enactment of the Act, "DOT was contacted by a coalition of handicapped groups, organized by PVA, specifically requesting use of regulatory negotiation" to develop a proposed rule, according to Ashby. David Capozzi, National Advocacy Director for PVA, and PVA's representative at the negotiations, explained that PVA felt that the regulatory negotiation process would allow for greater input from interested parties, and therefore produce a better rule than the traditional rulemaking process, where the agency usually drafts a proposal in a "vacuum."

DOT agreed with Capozzi's assessment. Ashby stated that the regulatory negotiation process "gets parties to agree to something they can live with . . . It draws the parties into a compromise rather than DOT reaching a compromise itself." From the perspective of the person responsible for drafting the notice of proposed rulemaking, Ashby added that that the regulatory negotiation process is "extremely valuable," and preferable to writing the proposal "from the top of my head."

## Preparation For Negotiations

**Identifying Interests.** Once DOT decided to go ahead with the regulatory negotiation process, an advisory committee, consisting of representatives of the interests which would be affected by the implementing regulations, was formed. DOT published a notice in the Federal Register tentatively identifying the potential participants to the regulatory negotiation.

Interest in participating in the regulatory negotiations was overwhelming. Of those groups identified by DOT as potential representatives, there were "no refusals to participate," according to Eisner. In fact, many requests to participate were denied.

> *"In the beginning, we were hopeful that the exit row seating issue could be resolved . . . if we [had] felt that the issue could not be resolved, we would have put it aside."*

DOT's intent was to have every significant interest represented by one participant, explained Ashby. Groups that represent a small constituency were turned down in favor of others that represent a broader constituency. However, in one situation, two organizations representing the same interest, i.e., visually impaired persons, were selected to participate in the negotiations because, Ashby explained, the two groups represented "very different substantive positions."

Eisner stated that 15 was chosen as the maximum number of participants in order to make the advisory group workable. The members of the advisory committee consisted of: seven organizations representing handicapped persons; six industry associations representing various interests including scheduled air carriers, flight attendants, and airport operators; and two federal agencies—DOT, who also represented the Federal Aviation Administration, and the Architectural and Transportation Barriers Compliance Board.

**Defining the Issues.** Ashby explained that before the advisory committee was formed, DOT had tentatively defined the issues to be negotiated, but that the development of additional issues during the negotiations was "an expected part of the process." Ashby cited, as an example of a major issue that was first raised during negotiations, the size and capacity limitations of small commuter airlines which could prevent these airlines from accommodating mobility-impaired passengers. "DOT hadn't thought of this problem until the negotiations," stated Ashby.

## Participants' Roles

**The Parties.** The relationships that develop between the participants to a regulatory negotiation are crucial to its success, explained Ashby. The willingness of the parties to compromise depends to a certain extent on the dynamics of these personal relationships. If they are negative, participants will question one another's motives. Here, the personal relationships that developed between the representatives of the handicapped groups and the industry groups were so positive that some of the interest groups could meet together and work on some of the unresolved issues even after the conclusion of the negotiations.

One of the problems with the regulatory negotiation process Eisner observed was that participants do not always send representatives who are skilled negotiators. Hoffman noted that there was a vast difference in the negotiating experience of the representatives. However, she was very pleased with the quality of the representation, and did not see the lack of experience of some of the participants as a problem. To overcome the lack of negotiating experience of some of the representatives, DOT had arranged for a one-day training session that was conducted before the meetings began to give these representatives pointers on negotiating technique. The training session also served to promote friendly relations between the participants.

**The Agency.** DOT participated in the negotiations as a party. The process was mediated by a neutral mediator from the Federal Mediation and Conciliation Service. In fact, according to Ashby, on practically all of the issues, "DOT itself did not have a predetermined position," but "could accept a broad range of solutions agreed upon by the parties." Eisner described DOT's "role to ask a lot of the questions, to bring people together, and to get information."

**The Mediators.** The precise role of the mediator in a regulatory negotiation has yet to be determined. There is no requirement under the Federal Advisory Committee Act that the mediator be a neutral third party; the mediator could even be an agency employee. However, "a neutral outside party is an advantage, it gives credibility to the process," explained Ashby. Using the services of a neutral mediator, the agency could incur "substantial costs," of $300-500 per day, according to Eisner. DOT obtained the services of FMCS mediators free. However, Eisner noted that it is not certain that FMCS can provide mediation services for all regulatory negotiations.

Hoffman stated that she and co-mediator Ted Chaskelson were invited by DOT to serve in a number of roles, which she described as "mediator/facilitator/convenor." Both mediators approached the regulatory negotiation as an experiment.

At the start of the negotiations, Hoffman encouraged the participants to determine their "needs" rather than just their "positions." One of the approaches taken by the mediators was to first get the parties to agree to an easy issue, referred to as a "softball." This allowed the parties to get to know and to trust one another, explained Chaskelson.

*"There was possibly confusion within the agency as to whether or not a safety issue was involved."*

The mediators clustered some of the more difficult issues and divided participants into work groups. This arrangement generally received a positive response from the participants. For example, Capozzi felt that the groups were very useful for working out the details of the more difficult issues.

As an experiment, the mediators got involved to a different extent with each of the work groups. Chaskelson stated that the mediators chaired some of the work group meetings, just sat in on other meetings, and did not attend other work group meetings as all. Chaskelson felt that the work groups were a success in using the energies of the participants who were most interested in particular issues.

Hoffman stated that although the involvement of the mediators varied throughout the process, she wanted "to have the solution come from the parties," she "didn't want to push people," but, "wanted the parties to feel good about the process [and] the result."

Ashby felt that the mediator took on too passive a role, that the meetings seemed lengthy and tedious at times, and that the point of discussions was often not reached. Capozzi agreed with Ashby, stating that the mediator acted more as a facilitator—by convening meetings and ordering lunch, and could have taken a more active role. Ashby recognized that the mediator thought it important to let the participants talk. However, he stated that some ground rules should have been established at the outset. Eisner added that different mediators have different styles and that the appropriate style depends on the type of negotiations. The right style for regulatory negotiation has yet to be determined, added Eisner.

Kirkpatrick and Capozzi each suggested that the negotiation process could have moved along quicker had certain preliminary matters been addressed before the negotiations began. Capozzi's suggestion was that a few meetings be held before the negotiations began, to establish issues and organizational matters, exchange facts, allow parties to state their interests, and establish good will between the parties. The mediators were not sure how valuable pre-negotiation meetings would have been because some of the questions that arose during negotiations might not have been thought of before the negotiations began. However, Hoffman added, she might try a pre-negotiation informational meeting in the next regulatory negotiation that she mediates.

## Non-Negotiable Issues

**Closely Held Principles.** The negotiations broke down as a result of an impasse that developed on the issue of the applicability of airline exit row seating restrictions to blind persons. Ashby described this issue as one viewed by "the National Federation of the Blind as a pure and simple matter of discrimination" and by "the carriers as a clean cut safety issue."

March 31, 1988
120 (Vol. 2)

NFB's representative at the negotiations, Dr. Kenneth Jernigan, stated that from the beginning, NFB "didn't believe the [regulatory negotiation] process would amount to anything" because, he continued, "matters of principle can't be solved with regulatory negotiation." Although NFB had joined in the request made to DOT to use regulatory negotiation, it did so only because it did not want to appear to be non-cooperative, Jernigan stated. He believed that some of the industry groups went into the negotiations with the same attitude. He also did not believe in the willingness of other participants to negotiate, stating that certain industry groups "went in with preconceptions" and "did not negotiate in good faith."

Capozzi, whose organization initiated the request made to DOT to use regulatory negotiation, said that each participant has to decide upfront, before the negotiations, whether there is some issue, such as a closely held principle, that is not subject to compromise. Capozzi felt that this situation was "discussed adequately before the parties sat down to negotiate." However, Capozzi continued, "in the beginning [the exit row seating issue] was not considered a civil rights issue."

Capozzi's view was shared by the agency and the chief mediator. At the commencement of negotiations, "DOT believed that the groups were ready to compromise on rights issues," stated Eisner. Hoffman agreed. "In the beginning, we were hopeful that the exit row seating issue could be resolved . . . If we [had] felt that the issue could not be resolved, we would have put it aside," stated Hoffman. "One of the ground rules [for participants of the regulatory negotiation] was that you have to believe that settlement could be reached."

**Misunderstandings.** Some misunderstandings regarding the applicability of safety requirements may have contributed to the impasse that developed on the exit row seating issue. NFB's representative, Jernigan, believed that DOT was "ducking the [exit row seating] issue with safety." Jernigan stated that he had overheard some industry people stating that there were no safety issues. Driscoll, representing the National Air Carrier Association, said that "some industry people may have stated during the process that there were no safety issues" with regard to exit row seating, and that these comments "may have mislead NFB." However, added Driscoll, no such comments were ever made by senior-level industry people. "There was no doubt [by the industry] that there was a safety issue involved," according to Driscoll.

> *"If all parties recognized that safety considerations were involved, maybe the [exit row seating] issue could have been resolved."*

Driscoll believed that what contributed more to the impasse was DOT's failure to define the safety issue up-front. "There was possibly confusion within the agency as to whether or not a safety issue was involved," stated Driscoll. "The industry believed there was definitely a safety problem." However, "it wasn't until three-quarters through the process that the agency finally said, 'yes there is a safety problem.' " Driscoll believed that NFB may have felt misled because of this situation. Driscoll concluded that he believes "if all parties recognized that safety considerations were involved, maybe the [exit row seating] issue could have been resolved."

## Time Commitment

A problem with regulatory negotiation, in general, is the commitment of necessary time by all participants. The negotiations for this regulation occurred over a five-month period. Hoffman stressed that in addition to the time involved in a regulatory negotiation, the negotiations are very "labor intensive." Coleman agreed that the process was an "extremely time consuming process . . . The preparation and meetings took a tremendous amount of time." Capozzi stated that the amount of time expended on the process was not a burden on PVA because the organization is large enough to have the resources to handle negotiations; however, for smaller organizations, the time involved in a regulatory negotiation could be a problem.

## Conclusion

Despite the impasse, and the reasons for the impasse, most all participants agreed that the negotiations provided the agency with valuable information for drafting its proposed rule and gave the participants a greater understanding of one another's positions and needs. Eisner and Ashby recognize the problems involved with regulatory negotiation, but remain proponents of the process. Ashby concluded by stating: "Anything worth doing is worth doing imperfectly."

**Regulatory Negotiation**

# Education Law Calls for Test Of Modified Reg-Neg Process

*Congressional requirement that selected regulatory issues be discussed by negotiating group leads to two-day meeting that introduces participants to reg-neg process.*

Parents, teachers, public interest groups, and state, local, and federal education officials met July 19 and 20 in Washington, D.C., to discuss selected aspects of draft regulations to be proposed by the U.S. Department of Education under the Elementary and Secondary Education Act of 1965. Amendments enacted in April require the department to submit a minimum of four issues to a "modified negotiated rulemaking" under the Chapter 1, Title I program of ESEA that assists school districts with disadvantaged children.

Although the meeting did not result in consensus on the issues discussed, members of the negotiating committee told BNA that they liked the opportunity to participate in the formulation of rules before they were proposed. The Department of Education opposed the congressional requirement, according to Mary Jean LeTendre, Director, Compensatory Education Programs, and is not yet committed to repeating what she characterized as a "very good experience."

## Legislative Compromise

Chapter One of Title I of ESEA, which provides federal funds to enrich educational opportunities for school districts with large concentrations of disadvantaged children, was re-authorized April 18 by the Hawkins-Stafford Elementary and Secondary School Improvement Amendments of 1988. Section 1431 of the ESEA which contains procedural requirements for developing and issuing regulations was expanded. The new language requires the Department of Education (ED) to submit a minimum of four key issues "to a modified negotiated rulemaking process as a demonstration of such process."

The idea of this experiment, according to Joseph Marinelli, Associate Superintendent, Orange County, Fla., came from the 1987 reg-neg used by the Environmental Protection Agency to develop rules under the Asbestos Hazard Emergency Response Act of 1986 (see 1 ADRR 133). Congress compromised between old and new ways of making rules by requiring ED to first schedule discussions of the regulations at regional meetings of federal, state, and local administrators, parents, teachers, and members of local school boards. These groups were then to be the source of members of the negotiating committee.

Mary Jean LeTendre, Director, Compensatory Education Programs, told BNA that regulations issued under the program are not usually challenged by litigation and that ED therefore saw no reason for a reg-neg process. Nevertheless, the meeting was convened by a July 11 notice announcing six issues selected for negotiated rulemaking. *53 FR 26214.*

## Reactions to Meetings

Because of the tight statutory deadlines—final regulations have to be issued within 240 days of the statutory enactment—only two days were allocated to the negotiations. Most of the participants found that time very short, according to Marinelli. In spite of this limitation, he found the reg-neg so "productive," he said, that he wrote to high level officials in ED endorsing the process. Marinelli told BNA that administrators of federal educational programs have "very little input" into federal regulations and once the rules are printed for comment, few, if any, changes are made.

A member of the negotiating group who represented the point of view of classroom teachers, Fran Gouze, of Atlanta, agreed with Marinelli's complaint that the meeting time was too short. She told BNA that "she had just begun to learn" how to be effective in the negotiations when they concluded. Gouze also emphasized how glad she was to be included. Unlike administrators, she said, classroom teachers seldom get such opportunities for input into rules that affect them. A school board member from Buffalo, N.Y., Judith Fischer, said that she found it "exciting" to be part of the negotiations and was better able to accept compromises made in the proposed regulations as a result.

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The regulatory negotiation was "a good addition" to the normal process, JoLeta Reynolds, Associate Assistant Commissioner, Special Education Programs in Tennessee, told BNA. Reynolds did not think that this process "should take the place" of notice and comment in rulemaking. She found the meetings "hard," but "she felt good about them."

## Federal Participants

Officials from ED got high marks from participants contacted for their careful preparation and willingness to "come in as one of us." LeTendre saw the meetings as providing a way for constituents to gain a better understanding of federal rules. She added that she was impressed by the demeanor and cooperation of the participants during the negotiations and found it "somewhat exhilarating to dialogue with those who impact our children."

Facilitators for the meetings were provided by other federal agencies. Daniel P. Dozier, Legal Counsel of the Federal Mediation and Conciliation Service, chaired the negotiating sessions, assisted by Deborah S. Dalton, of the U.S. Environmental Protection Agency's reg-neg project, and Louis Manchise, an FMCS field negotiator. Chris Kirtz, who heads the EPA project, provided pre-negotiation training to the participants.

The department specified that the facilitators "will not be involved with the substantive development of the regulations." Dozier told BNA that issues and regulations under Title I were very complex. As mediator, he felt no need to intrude on the substance of the discussions because the participants had "a long history" together and knew the subject matter intimately. However, they told him that the negotiations taught them a "sense of partnership" that was new and welcome.

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# Regulation by confrontation or negotiation?

*Business and government should limit the role of intermediaries in the regulatory process*

*Robert B. Reich*

The federal regulation of industry has suffered through a long history of bitter confrontation, tactical infighting, strategic delay and deception, and the mutual insensitivity of both business and government to each other's legitimate needs. In today's troubled economic climate, however, neither regulator nor regulated can tolerate this unproductive status quo without ill effect. Important social goals are unnecessarily postponed; the competitive health of companies and industries is unnecessarily sacrificed. In fact, the only actors in the regulatory process who profit from this state of affairs are the professional intermediaries—the lawyers, consultants, staff members, and public relations experts whose numbers in Washington, D.C. have increased so rapidly of late. Too often, these intermediaries help maintain hostility between business and government on regulatory matters. The author provides a useful description of how these intermediaries work and suggests several practical methods for moderating their influence in Washington.

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The business community's complaints about government regulation are legion. It is not so much the goals of regulation to which business objects, however, as it is the impractical, often insensitive, means by which regulations are devised and implemented. After all, most business executives would agree with government that the public deserves some protection from toxic wastes, nuclear accidents, air and water pollution, monopoly, unsafe products, fraudulent claims, and unfair trade practices.

Despite the substantial resources of money (estimated to exceed $2 billion annually) and management attention expended on the regulatory process, the business community has had remarkably little success in affecting either the design or the implementation of regulations. This failure stems, in large part, from the business community's negative, defensive, and reactive attitude. Rather than seeking practical solutions jointly arrived at, business has often denied that problems exist, argued that problems do not warrant government interference, or sought to place the blame elsewhere.

On their side, the regulatory agencies have also contributed to this adversarial relationship. They have often threatened massive subpoenas, broadcast adverse publicity, and installed cumbersome mechanisms of compliance.

As a result, the process of designing and implementing regulations has become a terribly expensive zero-sum game: if business wins, the proposed regulation is stymied; if government wins, a new and seemingly oppressive regulation is imposed. These war games are suspended only at times of genuine crisis, such as the imminent financial collapse of a major company, industry, or city. Then, at the eleventh hour, business executives and government officials sit down together, roll up their sleeves, and seek workable solutions.

To be sure, confrontation between business and government as adversaries does serve important public ends, not the least of which is the visible assurance it gives the public that its interests are being protected. Not many years ago, regulatory agencies were accused of being "captured" by the very industries they sought to regulate. Cozy relationships between regulator and regulated–including secret meetings, expense-paid vacations, and promises of future employment–spelled collusion rather than collaboration. Though an adversarial process can help ensure the legitimacy of regulation, it is highly doubtful that even this noble goal requires the present degree of hostile confrontation.

## Common explanations of regulatory confrontation

**Why have business and government been unable to cooperate in devising regulations? Why has the regulation-making process become such an unproductive exercise? Several plausible explanations have been offered, but none seems entirely satisfactory in light of what is already known about the nature of the regulatory process.**

### Legal constraints

One common explanation derives from the legal procedures that constrain regulatory decision making. To an ever-increasing extent, this activity has come to resemble a courtlike adjudication, often permitting the involved parties to make oral presentations, cross-examine opposing witnesses, and appeal rulings to the federal courts. Admittedly, these courts and Congress have continually pushed regulatory agencies in this "judicialized" direction.

The legal constraints, however, cannot fully account for the extent to which business and government fight over regulation. The constraints apply only after a federal agency has proposed a new regulation–a point that comes late in the decision-making process, when battle lines have already been well established. Yet it is precisely during the period before the constraints take hold that constructive participation by business could help ensure that the ultimate regulation would be sensible. By the same token, confrontation at this stage virtually guarantees a protracted, inefficient, and dysfunctional process for both business and government.

### 'New class' conflict

Another common explanation is that the key officials and staff of regulatory agencies comprise what has been dubbed a "new class" of public policy professionals–a class that is opposed to both economic growth and corporate power and that views regulation as a means of putting an anticapitalist philosophy into effect. Given so fundamental a clash of ideologies, collaboration between business and government is just not feasible.

On close inspection, this theory also proves unconvincing, for, in my experience at least, most regulatory officials and staff members have been committed to a free enterprise economy. Of the higher-level civil servants who leave government employment within six years–some 90% of agency officials and 65% of professional staff members–most go on to represent corporate interests to the government by taking jobs in the private sector.

Thus, far from comprising a new class, most regulatory agency personnel share precisely the same upwardly mobile, middle-class values held by their counterparts in corporations.

### Cultural contentiousness

A third explanation is that hostility in the regulatory process is merely one aspect of the ethos of competition and conflict that characterizes so much American history and culture. In this view, corporations and regulatory agencies naturally find themselves pitted against each other because they are competing for economic control of particular industries, social status, and political autonomy.

But this theory fails to account for the extraordinary history of cooperation between business and government in such sectors as agriculture and aerospace, where detailed regulatory controls to ensure high quality and performance have long been administered in conjunction with policies to support industry through procurement, research and development, loan guarantees, price supports, special tax advantages, and the like. Furthermore, both these sectors have been among our most productive and innovative, and neither has been marred by the sort of collusive, public-be-damned relationship that has on occasion characterized the regulatory agencies and their regulated industries.

### Controversiality of issues

A fourth explanation is that the tensions between business and government over regulation often reflect the controversial nature of many regulatory issues. Controversy is inevitable in, for example, decisions about the location of nuclear power facilities and toxic waste dumps, workplace safety, permissible levels of air pollution, and the degree of risk allowed in new drugs. Only through explicit conflict can the necessary bargains be struck, competing interests accommodated, and workable consensus established.

There is, however, an important difference between those conflicts that are necessary precursors to fair and expeditious compromise and those that represent merely tactical maneuver and zero-sum gamesmanship. All too often, the regulatory process has served less to address the political and moral issues implicit in the proceedings than to cloud them, less as a vehicle for consensus building than as a means for driving parties further apart.

## Business-government intermediaries

Neither the legal restraints placed on regulatory decision making nor the ideological predispositions of regulators, neither the contentiousness of American culture nor the controversiality of the issues at stake can fully account for the extent to which government and business do regulatory battle.

An additional, though often neglected, explanation can be found in the behavioral norms and institutional incentives of the professionals who specialize in communicating between government and business on regulatory matters. This group possesses such unusual skills and represents so particular an economic interest that it seems fair to refer to them as an industry unto themselves—an industry that is growing rapidly in an environment that it has done much to create.

### A problem of communication

Unlike such capital cities as London, Paris, and Tokyo, which serve as national centers of trade, finance, education, and the arts, Washington, D.C. has only the federal government to give it prominence. Major business, intellectual, and creative enterprises are, for the most part, located elsewhere. Thus, while in other capitals government leaders meet frequently and informally with the leaders of other influential communities, no such easy communication takes place in Washington. This fact, especially when coupled with the relatively short tenure of most U.S. regulatory officials, prevents federal policymakers and business executives from enjoying the same casual give-and-take, comfortable candor, and long-term familiarity that often characterize business-government relationships elsewhere.

Whatever dangers such frequent and informal contact may pose to the democratic control of the policymaking process, it does at least facilitate efficient communication between the public and the private sector. Advanced industrial societies—with their complex technologies, intricate trading and financial arrangements, and labyrinthine government bureaucracies—require extensive internal coordination if they are to run smoothly, and such coordination requires, in turn, efficient communication. In Washington, communication has come to depend on specialized professionals who act as intermediaries between government policymakers and business executives.

### A new kind of professional

Who are these intermediaries? They are the approximately 12,000 Washington-based lawyers who represent business before regulatory agencies and the federal courts, the 9,000 lobbyists who represent business before Congress, the 42,000 trade association personnel who keep close watch on pending regulations and legislation, the 8,000 public relations specialists who advise business executives about regulatory issues, the 1,200 specialized journalists who report to particular industries on government developments that might affect them, the 1,300 public affairs consultants who help business organize to deal with regulation, and the 3,500 business affairs consultants who provide regulatory officials with specialized information about particular industries.

Together with the 15,500 lawyers, lobbyists, and public relations specialists within regulatory agencies and large corporations, these intermediaries comprise a virtual industry of their own.

Members of the industry usually work in Washington for several years in a variety of related positions—first, say, on a congressional staff, then on a regulatory agency staff or a trade association, then in a Washington law firm or public relations firm, then perhaps again in a senior congressional agency position, and then in a senior trade association position. They circulate freely among the points of the Washington compass and change jobs frequently.

Their skills are for the most part strategic, not substantive. They know how to "position" a client to reduce unfavorable exposure, minimize risk, gain a positive image, fend off threats to its autonomy, enlarge its domain, reduce its vulnerability, or generally thwart its rivals. And though they may on occasion consult with economists or scientists, they are not so much interested in the truth or falsity of what these specialists have to say as in its tactical value—the extent to which it can bolster a client's argument or discredit the argument of a specialist on the other side.

## A supplier of services

These intermediaries are in the business of providing several types of service to their clients:

☐ Information about what the "other side" is doing in the form of newsletters, briefings, conferences, seminars, "insiders' " trade reports, and lawyers' opinion letters.

☐ Representation of each side's arguments, analyses, and data to the other in the form of corporate legal briefs and memoranda, scientific reports, economic analyses, and marketing surveys as well as agency speeches, enforcement guides, advisory opinions, and press briefings.

☐ Manipulation of administrative procedures. On behalf of the corporation, this manipulation may involve "stonewalling" requests for information through interminable litigation, filing endless motions over minute procedural matters, seeking frivolous injunctions and interlocutory appeals in the federal courts, and inundating regulatory staff members with so much data that they are unable to sift through it; on behalf of the agency, such manipulation may entail issuing overly broad subpoenas, initiating "fishing expeditions" through business files, and harassing businesses for failing to comply with picayune legal requirements.

☐ Political pressure on each side in the form (again, on behalf of the corporation) of organizing political coalitions opposed to pending agency action, arranging visits for business leaders with their legislative representatives, urging employees and citizens within affected districts to write to their legislators in opposition to agency action, placing advertisments in major newspapers, sending canned editorials and press releases to appropriate local media, and conducting public opinion polls. Tactics on behalf of the agency may include releasing studies and reports that purport to show the need for the agency's action, instigating newspaper investigations of particular industries for allegedly harmful activities, and meeting with legislators to convince them of the need for regulatory action.

Most of the major regulatory controversies of recent years have involved platoons of intermediaries providing each of these services. The Food and Drug Administration's proposed ban on saccharin, for example, pitted consumerists, nutritionists, and FDA staff against the Calorie Control Council, a trade association representing the soft drink industry. The council, which ultimately "won" by staying the hand of the FDA, worked closely with several teams of Washington lawyers who specialized in food and drug regulation and a public relations firm that organized a coalition of diabetics and weight watchers.

In the confrontation over the Federal Trade Commission's proposed rule concerning television advertising directed at children, the U.S. Chamber of Commerce, the Grocery Manufacturers of America, the American Association of Advertising Agencies, several sugar refiners and cereal manufacturers, and the National Association of Broadcasters teamed up against the FTC staff and its allies—the Consumer Federation of America, Action for Children's Television, the AFL-CIO, and the American Association of Retired Persons. Intermediaries on both sides drafted testimony and legal briefs, prepared witnesses for congressional hearings, sent information to editorial writers around the country, and organized visits to key members of Congress.

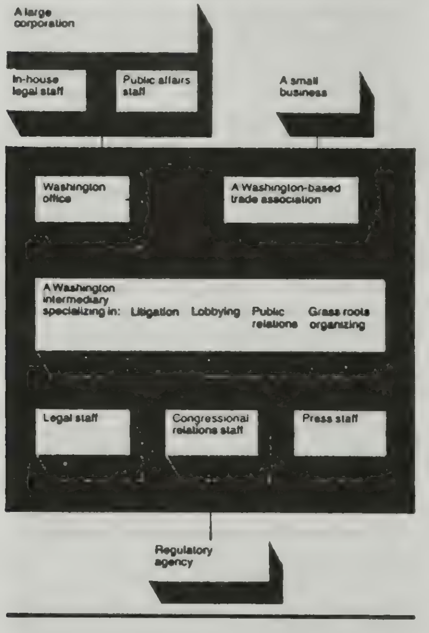
## A new growth industry

More and more, these services are being supplied by integrated "full service" organizations modeled after the public interest groups that since the mid-1960s have coordinated information, legal representation, administrative tactics, and political pressure within a single, overall strategy (see *Exhibit I*). In much the same fashion, Washington-based law firms that specialize in lobbying are merging with law firms that specialize in regulatory litigation, and both are affiliating with public relations firms and advertising agencies.

Similar developments are taking place in larger corporations and in the regulatory agencies themselves, as specialists in congressional relations, public relations, press relations, government affairs, and legal tactics are increasingly assigned to the same managerial units.

This broad trend toward integration of services permits economies of scale and coordination, but it also allows the intermediaries to function as entre-

Exhibit I
**The channel of communication between business and the regulator**


A large corporation
In-house legal staff
Public affairs staff
A small business
Washington office
A Washington-based trade association
A Washington intermediary specializing in: Litigation Lobbying Public relations Grass roots organizing
Legal staff
Congressional relations staff
Press staff
Regulatory agency

preneurs: they identify groups of businesses that can be organized to take advantage of their services, create new trade associations, broker among associations that are already in existence, and forge new coalitions that will hire them to manage particular issues.

And hire they do. The number of lawyers specializing in regulatory matters has grown by more than 18% each year for the past five years, and major Washington law firms have doubled in size over the past seven years. One hundred seventy-eight law firms now have branch offices in Washington, a 100% increase since 1975. Trade associations are moving to and being created in Washington at the rate of more than two per week; there are now over 2,000 of them located in Washington, a 250% increase during the past decade.

Public relations firms specializing in regulatory issues are also burgeoning, their billings increasing by more than 20% a year. Moreover, large corporations are opening Washington offices at a fast clip: 500 U.S. corporations now have full-time Washington staffs, double the number of corporations that had them in 1970 (see *Exhibits II-VI*). Meanwhile, the size of these Washington staffs has tripled.

## Principles of intermediaries' success

Obviously, tension between business and government is necessary if intermediaries are to sustain or enlarge their economic base. This is not to suggest that intermediaries seek to foment business-government confrontation or that they do not often provide valuable help and information. Confrontation is, however, an unstated principle of their calling. It is a premise on which they operate, a precondition necessary to everything they do, and therefore a state of affairs that they encourage and cultivate by virtue of the role they assume. Confrontation is their professional frame of reference, and it is within this frame that they measure their own success.

Several principles, therefore, can be observed to guide their actions:

**Seek to achieve clear controversies in which a client's position can be sharply differentiated from that of its regulatory opponent.**

A sharply drawn regulatory dispute serves an intermediary's interest in several related ways. It can be used to justify the services provided a client and can perhaps even convince that client that still more resources are needed to carry on the battle. It can also be used to demonstrate to other potential clients the intermediary's virtuosity in mounting an aggressive campaign of legal maneuver, media management, and political pressure tactics.

Finally, a dispute provides a standard by which an intermediary's services can be evaluated: a victory in the dispute strengthens the intermediary's reputation and thus provides a vehicle for self-promotion in the future. Even a "loss" can be advantageous, for it can be used to show how ruthless and mighty is the opposition and how important is continued vigilance in the face of such odds.

This principle manifests itself in a variety of ways. First, it encourages intermediaries to take extreme positions that tend to exaggerate the differences be-

Exhibit II

**Prevalence of government relations units according to size of company**

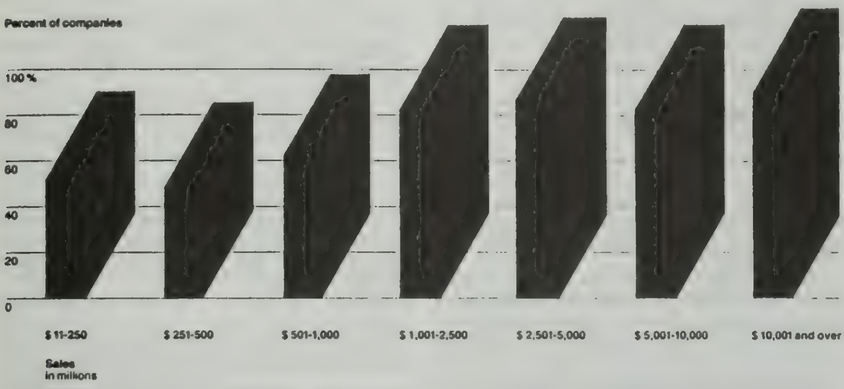
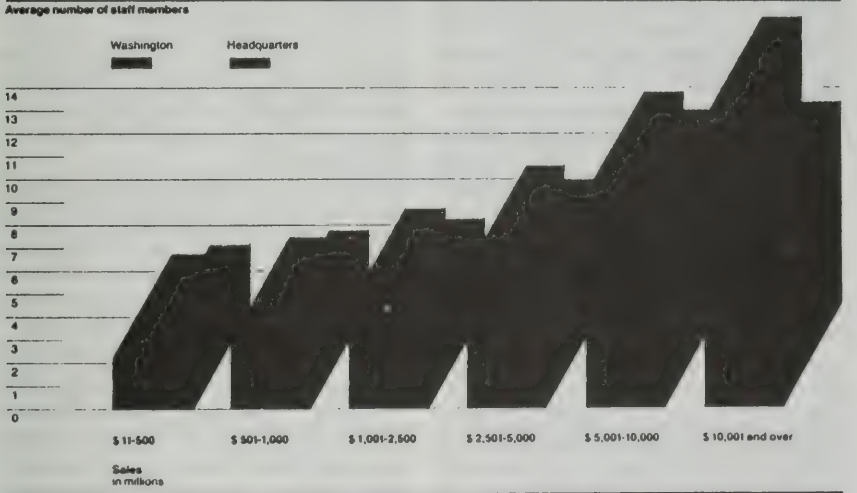


Exhibit III

**Average size of headquarters unit and Washington office according to size of company**



tween the two sides. More important, it actively discourages intermediaries from heading off regulatory disputes—by engaging in informal problem solving at an early point, by seeking voluntary solutions that would prevent the necessity for regulation, by taking steps to avoid problems before they occur, or by seeking out areas of agreement on which compromise might be based.

Intermediaries seldom, if ever, gain credit for preventing regulatory problems from arising. Those who represent business cannot make their mark by dissuading regulators from proposing a particular regulation, since this sort of victory is difficult to document. On the contrary, they can do far better by waiting until regulatory action has begun (or even by quietly encouraging it) and then going into battle with guns blazing.

The same is true, of course, for lawyers, investigators, and regulation writers within regulatory agencies. They do not stand to gain professionally from engaging in quiet diplomacy with business aimed at minimizing the need for regulation. Their careers depend on more visible victories—a regulation finally promulgated, a penalty imposed, a favorable court decision.

Not long ago the National Highway Transportation Safety Administration (NHTSA) conducted tests of the crashworthiness of various automobiles. Afterwards, in an effort to obtain voluntary agreement about how the models could be made safer, NHTSA officials sought meetings with the manufacturers of cars, both domestic and foreign, that had failed the tests.

The U.S. manufacturers, represented at the meetings by their lawyers and government relations staffs, refused to discuss possible improvements. They argued instead that the tests were flawed. The foreign manufacturers, represented at the meetings by the engineers who had designed the cars in question, wanted to know precisely why their cars had failed. They brainstormed with NHTSA staff about the best means of increasing safety and, largely on the basis of those discussions, eventually devised low-cost improvements that enabled their automobiles to pass the test.

This distinctively American thirst for controversy also expresses itself in a myopic concern for gaining tactical advantage in regulatory battles. Some months ago I invited several corporate executives to a meeting to discuss a consumer problem that had arisen within their industry. The Federal Trade Commission had been inundated with complaints for months, and it seemed clear that, if the complaints were well founded, some sort of regulatory action would be necessary unless the industry took steps to mend its ways.

Exhibit IV

**Companies with government relations units more than three years old shown by industry grouping**

| Industry | Percent at headquarters | Percent in Washington |
|---|---|---|
| Transportation | 89% | 100% |
| Lumber and paper | 88 | 78 |
| Metals | 88 | 72 |
| Chemicals | 80 | 75 |
| Life insurance | 75 | 57 |
| Food | 74 | 77 |
| Petroleum | 67 | 93 |
| Retail and wholesale goods | 64 | 100 |
| Banks | 63 | 100 |
| Utilities and communications | 63 | 57 |
| Diversified finance | 57 | 100 |
| Manufacturing | 56 | 78 |
| Machinery | 53 | 58 |

Each of the executives agreed to the meeting. Some expressed surprise and even gratitude that, before taking formal action, the agency was willing to talk informally about the problem and seek voluntary solutions to it. Within 10 days of my invitation, however, each of the executives called back with a similar message: each had been advised against attending such a meeting by legal counsel, a government affairs vice president, or a trade association representative.

A few of the executives were particularly candid about the advice they had received. It was not in their interest, so they were told, to "stick their necks out" by attending such a meeting at this early stage. The visibility could be dangerous. Moreover, it would, by lending credence to the agency's concerns, almost certainly encourage the agency to take some sort of regulatory action. It would be better to wait until the issue became crystallized—that is, until they could get a clearer idea of what the agency was planning to do and how seriously the agency was taking the problem.

I received a similar message from the FTC staff members responsible for regulating the industry. They were also opposed to such a meeting because, they argued, it might "tip our hand." The industry might learn what information we at the agency had about the problem, how far we were prepared to go in fighting it, and what strategies we might use in attempting to regulate against it. It would be far better, they warned, to wait until we had more information about the problem—that is, until we had a much better idea of what we wanted from the industry—and until we could readily threaten the industry with a specific set of regulatory initiatives.

Both sets of advice came from people who believed they were acting in the best interests of their clients. Given the frame of reference in which these intermediaries work, their advice was probably correct. Regulatory battle could not be waged successfully if both sides talked candidly at an early stage about how to remedy the problem at issue. But their frame of reference was, of course, inappropriate. The proper goal was not to wage battle successfully but to remedy the problem quickly and efficiently.

**When informing a client about its regulatory opponent, exaggerate the dangers that the opponent's activities and designs imply.**

Providing the worst possible interpretation of an opponent's activities and motives often alarms a client and stiffens its resolve to fight. Such an extreme characterization may also elicit additional resources from the client and may even enable the intermediary to convince several other clients to join in the fray.

This principle is most evident in trade association newsletters, bulletins, and conferences, which regularly excoriate regulatory agencies and caricature their activities.

Several years ago, before I knew better, I met with the editor of a trade association newsletter who wanted a "background briefing" about the sorts of initiatives the FTC might undertake in the next few years. After explaining to him that my list of possibilities was extremely tentative (the five commissioners had not as yet approved any of them and comparatively few of them had any likelihood of reaching fruition), I let loose.

Three weeks later I was aghast to see the entire list printed in the trade association newsletter under the headline "FTC Maps Future Policy." The article described the list as "what we can expect from FTC activists" and cautioned association members about the FTC's "ambitious designs" on their industry. The article ended with an ominous warning that "unless we take effective action now, these initiatives will be undertaken within the next two years."

Exhibit V
**Companies with government relations units more than three years old according to size of company**

| Size of company shown by sales in millions | Percent of headquarters units | Percent of Washington offices |
|---|---|---|
| Under $ 250 | 70 % | 61 % |
| $ 251-500 | 68 | 40 |
| $ 501-1,000 | 63 | [illegible] |
| $ 1,001-2,500 | 72 | 72 |
| $ 2,501-5,000 | [illegible] | 88 |
| $ 5,001-10,000 | 67 | 94 |
| Over $ 10,001 | [illegible] | 100 |
| Total sample | 70 % | 75 % |

Dire warnings are also sounded by legal counsel. Lawyers are, after all, trained to foresee the worst possible consequences stemming from any given situation and to prepare a client for them. This skill, when finely honed, necessitates not only a skeptical and somewhat pessimistic attitude toward all undertakings but also a degree of suspicion (occasionally bordering on paranoia) concerning the plans and motives of any potential opponents.

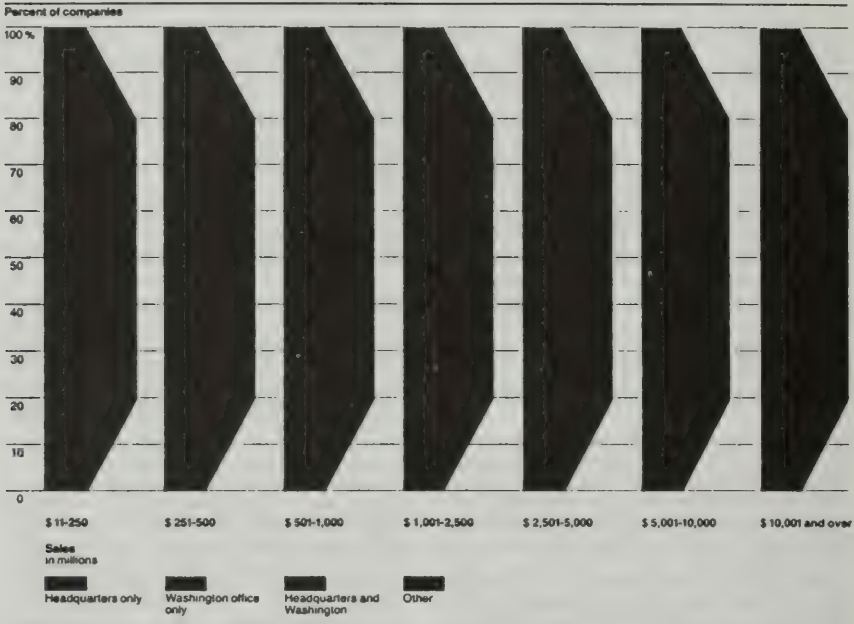
This kind of advice can be of enormous value, but it can also become dysfunctional when business executives and regulatory officials lose sight of the fact that legal counsel naturally conjure up worst-case scenarios. Their job is primarily to avoid such eventualities rather than to accomplish some positive goal.

In recent years, within both regulatory agencies and executive suites, legal counsel have been delegated substantial responsibility for business-government relations, and the officials to whom they report frequently accept their advice without question. Warnings of possible legal problems can intimidate all but the most fearless executive. Too often, the worst possible implications to be drawn from an opponent's actions or intentions are accepted as fact, and confrontation strategies are perceived to be the only rational means of dealing with them.

**Once conflict has begun, prolong and intensify it.**

A regulatory skirmish is by no means so useful a vehicle for advancing an intermediary's career as is an intense and protracted battle. Reputations of lawyers, lobbyists, and public relations specialists have been established on the basis of such major conflicts as the continuing furor over automobile

Exhibit VI
Types of unit according to size of company



airbags, the deregulation of natural gas, and the disclosure of health risks in certain foods and drugs.

Prolonged hostilities provide a continuing showcase for tactical acumen and warlike aggressiveness. They usually involve many parties–industries, corporations, trade associations, law firms, public relations firms, consulting firms, congressional committees, and regulatory agencies. Intermediaries who follow a typical career path often wish to demonstrate their political savvy and adversarial skill to as wide a range of potential employers as possible. I know of some successful intermediaries who, rising to ever more responsible positions as the original conflict grew and spread into new battles and second-order skirmishes, have worked on various sides of the same major issue for 15 years in a half-dozen different organizations.

Besides facilitating career advancement, these regulatory marathons can also provide intermediaries with a secure source of income for many years. Lawyers may spend a large portion of their working lives on a few such controversies, and public relations specialists who represent clients in a protracted battle may gain semipermanent employment. For example, when in 1959 the Food and Drug Administration proposed a standard for the content of peanut butter, it launched a regulatory battle that kept a goodly number of intermediaries gainfully employed for 12 years.

Of course, their motives are not solely pecuniary. Pride in their work, a concern for punctiliousness, a desire to win for the sake of winning, and a limited understanding of the broad goals of business-government cooperation all play a part.

**Keep business executives and regulatory officials apart.**

Direct contact between business executives and regulatory officials, under any but the most formal circumstances, can jeopardize the intermediary's efforts to create and maintain regulatory conflict. Since these leaders, given a chance, are liable to discover their mutual interest in avoiding conflict and solving problems, they may also discover that they have little need for the elaborate infrastructure of intermediaries they support.

Intermediaries, therefore, usually seek to maintain a monopoly over the channels of communication between business executives and regulatory officials. They must be kept at a safe distance from each other, and on the few occasions when they do meet, intermediaries must be in attendance to ensure that tensions are sustained.

Washington lawyers, trade association officials, and public relations specialists usually advise business executives against meeting directly with regulators to discuss mutual problems. Their reasoning is that the executives are not sufficiently knowledgeable about issues that could arise and may, as a result, inadvertently say something prejudicial to their own interests. Not surprisingly, staff members of regulatory agencies proffer much the same advice to regulatory officials.

When one small midwestern trade association recently offered to set up a meeting between a dozen of its member executives and several regulatory officials to discuss issues affecting the region's industry, a national trade association and its Washington counsel, which also represented several of the businesses, objected violently. They argued that such a meeting would jeopardize the delicate relationship they had established with the regulatory agency. The agency staff also objected on similar grounds.

A compromise of sorts was reached: a predictably useless meeting took place with 150 people in attendance, including all the Washington lawyers, trade association staff, and regulatory staff whose "delicate relationship" could not risk a less formal setting.

## Breaking the circle

These four principles have in recent years contributed significantly both to the atmosphere of hostility currently existing between the business community and government regulators and to the dramatic growth of the intermediary industry itself. These two phenomena are, of course, interrelated: as hostility mounts, the intermediary industry grows and prospers; as the industry grows, it facilitates yet more confrontation and hostility.

This vicious circle has been broken only at times of genuine economic crisis, but the level of crisis sufficiently compelling to engender real business-government collaboration has grown ever higher as the intermediary industry has increased in size and effectiveness.

Hence, the only hope for breaking this circle of fruitless confrontation before things get entirely out of hand lies in reforming—and at times circumventing—the intermediary industry. Business executives and regulatory officials can promote responsible collaboration on regulatory matters by restructuring their relationship in several ways.

### Invest in problem solving

Both sides should take as their primary goal the finding of solutions to problems rather than the winning of battles. As a first step, both should determine the total sums currently spent for the legal, government relations, public relations, and lobbying services of their intermediaries and then reduce that total by at least one-third. The money saved should be used to purchase the services of engineers, scientists, economists, marketers, epidemiologists, and other technical specialists who could help devise genuine solutions.

To be effective, this strategy would require both sides to anticipate problems and begin searching for solutions to them long before they reach the level of crisis—or scandal. The disposal of toxic wastes, for example, was recognized as a potentially serious problem 25 years ago, but government and business did not begin to address it in earnest until quite recently. By that time, public demand for immediate action had prompted the Environmental Protection Agency unilaterally to propose regulations that forced industry to take the defensive.

Other issues now on the horizon will become major regulatory battles five years from now unless solutions are found in the interim. The sudden closing of factories, the safeguarding of personal privacy with the advent of interactive cable TV and centralized banking services, the sexual harassment of female employees, the dangers of genetic engineering—these and many other emerging issues cry out for substantial anticipatory research by both business and government.

There is also the model of the royal parliamentary commission in Britain, within the framework of which academicians, business and community leaders, and various specialists can examine and make recommendations for expected public problems. These bodies usually hold hearings and undertake research sufficiently in advance of any formal lawmaking to be able to serve as constructive vehicles for problem solving.

## Develop an early warning system

Some problems, of course, simply cannot be anticipated. Business executives and regulatory officials should warn each other of problems as early as possible. Evidence of a higher than normal incidence of product defects or consumer accidents, an outbreak of illness among workers, epidemiological data showing a troubling pattern of disease within a particular region or occupational group, and reports of fraudulent marketing practices within an industry—this sort of information should be conveyed quickly so that steps can be taken immediately on both sides to remedy the problems before further harm is done and regulatory confrontation encouraged.

Business executives may be reluctant to convey this type of preliminary evidence, however, if they believe that government officials will use it against them in subsequent legal proceedings or release it to the public before it is properly evaluated. To allay this concern, government officials might agree in advance that such early warnings will be neither used in formal proceedings nor revealed to the public until carefully evaluated. The establishment of such "free fire zones," in which business executives can speak candidly to regulatory officials about potential problems without fear of reprisal, would go a long way toward encouraging early exchange of potentially damaging information.

## Engage in public negotiation

No good reason exists for business executives and regulatory officials to await formal regulatory proceedings before they attempt to reach a consensus on how best to solve an emerging problem. Informal negotiations with consumers, employees, shareholders, community representatives, or any other affected group should be undertaken as soon as an issue becomes sufficiently crystallized that they are willing and able to seek resolution.

These negotiations might be held under the auspices of public mediators deemed acceptable to all sides or of universities or other nonprofit institutions that could act as neutral third parties. The negotiations would seek to narrow areas of disagreement, identify disputed facts, and establish as wide an area of consensus as possible *before* formal regulatory proceedings began.

Public negotiations have been attempted with some notable success. The National Coal Policy Project, for example, brought together industrialists and environmentalists for discussions aimed at clarifying their positions and seeking areas of agreement. These discussions resulted in more than 200 recommendations concerning mining, air pollution, conservation, energy pricing, emission charges, and transportation. Some of them—such as support for the full marginal cost pricing of energy and rules for the location of coal-burning power plants—were quite specific. Others established a broad framework for further negotiation.

## Review & monitor intermediaries' performance

None of the foregoing recommendations will have any lasting effect, however, unless business executives and regulatory officials change the incentives operating in the intermediary industry. As a first step, they should scrutinize the strategies, activities, and recommendations of their intermediaries as rigorously as they review the performance of the other specialists on whom they rely.

Protracted regulatory battles should be recognized as signs of intermediary failure, and problem solving that prevents conflict as the mark of success. Outside counsel might, for example, be compensated on a schedule of diminishing rates over the duration of an assignment. As the battle continues, their marginal rate of compensation would decline. Similarly, when choosing counsel to represent them before regulatory agencies, business executives might first ask whether the lawyers had successfully avoided regulatory conflict in the past or had devised creative solutions to problems.

Finally, regulatory staff who have gained the voluntary agreement of business to a particular remedy might receive special bonuses amounting to a percentage of the funds saved by preventing protracted battle.

In addition, steps should be taken to ensure that Washington staff do not become so insular that they lose sight of broad goals because they are mesmerized by the lure of battle. Companies with their own Washington-based government relations offices might bring in staff from other departments for limited tours of duty rather than hire former congressional aides and regulatory personnel.

Companies without such offices might select trade associations or public relations firms on the basis of the practical business experience of their staffs rather than their touted Washington savvy. And regulatory officials might try to attract to their staffs people with working experience outside the political-regulatory confines of Washington.

## Negotiation, not confrontation

New winds are now blowing through Washington. At this writing, the Reagan administration is taking steps to ease the regulatory burden on American business. But such steps will poorly serve both business and the nation if they postpone the attainment of a cleaner, safer, and more humane environment. The public will continue to demand these goals, and responsible businesses will respond. Our problems derive not from the goals themselves but from the processes through which we have sought to achieve them.

We can no longer afford the high price of regulatory warfare. It saps the scarce resources of business and government and fails to solve critical public problems. The regulatory process should never become a free-for-all of confrontation. It should facilitate compromise and flexibility, not unblinking rigidity. Above all, it should encourage creative problem solving, not tactical gamesmanship.

In this, as in so many other aspects of business strategy, we can perhaps take a lesson from the Japanese and West Germans. Although their health and safety regulations are no less stringent than ours, the processes by which they devise them are far less adversarial. In both countries, business and government leaders collaborate conscientiously to develop workable standards. They place little reliance on formal legal proceedings or on specialized intermediaries. Indeed, only 1 out of every 10,000 Japanese citizens is a lawyer; out of the same number of Americans, 20 are lawyers.

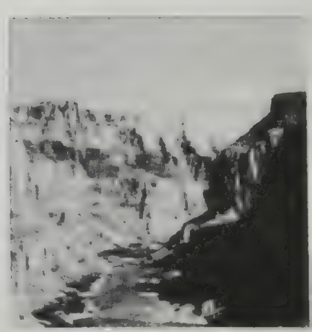
The business-government relationship in the United States is ripe for responsible collaboration. But to achieve it, business executives and regulatory officials must first restructure the means by which they communicate. They must be willing to meet directly to discuss regulatory problems—long before the problems become scandals and long before regulators must respond with sudden, dramatic initiatives. They must actively seek solutions to such problems. And, above all, by penalizing delay and pointless strategem and by rewarding flexibility and cooperation, they must alter the incentives of their intermediaries.▽

WASHINGTON WATCH

# See You Later, Litigator

*Regulatory negotiation toward consensus*

**Kathrin Day Lassila**



*A "reg neg" helped clear the air over Grand Canyon.*

Ten years ago, an administrative lawyer named Phil Harter published an article in the *Georgetown University Law Journal* that he privately thought too radical to attract any serious interest. It was the longest article the journal had ever published, and small wonder. It consisted of a detailed proposal for improving one of the most byzantine functions of federal government: the process by which executive branch agencies translate new laws into the web of regulations governing daily life and business in the United States.

What Harter proposed was a method by which a federal agency could bring together the parties interested in a given set of rules and let them negotiate solutions to their differences; rather than rely on the agency to publish a rule that might well satisfy none of them, they would, in effect, write the rule themselves. He did not originate the idea (one of many circulating in a period of ferment over administrative reform), but he was the first to put flesh on its bones by outlining a procedure that wedded negotiation to the regulatory process. What made his proposal radical was that, at the time, the parties with interests in any given set of regulations rarely met or talked at all—except after the rules were written, when they took their grievances into court. "The previous ten years had been a time of increasing judicialization," Harter says now. "This went completely against the trend. I thought nobody would take it seriously."

Eight years later, Harter's proposal was signed into federal law as the Negotiated Rulemaking Act of 1990. The next year, both the *New York Times* and the *Washington Post* editorialized on the usefulness of regulatory negotiation, the *Times* calling it "immensely valuable." Today, a decade after Harter's article was published, regulatory negotiation (colloquially known as "reg neg") is the method of choice in some of the most significant federal rulemakings. And Phil Harter now devotes the greater part of his private law practice to mediating and facilitating the very process he once thought would never be taken seriously.

In the environmental arena, reg negs gained ground slowly at first. The Environmental Protection Agency (EPA) tried the technique first in 1984, when it oversaw the creation of rules establishing penalties for truck engines that violate air pollution standards. Other rules crafted through negotiation in the mid- to late 1980s included performance standards for wood stoves and emergency approval procedures for new pesticides. Reg negs also achieved partial success on underground waste injection, but negotiations on pesticide protections for farmworkers failed.

These early attempts were cautious, Harter says; all the parties—the EPA, state officials, industry, environmentalists, and Harter himself—were still groping after the right practical application for reg negs. But in 1990, regulatory negotiations on airborne toxic leaks from chemical plant equipment produced what he calls "a whole new approach to air quality standards." In the course of the talks, the Chemical Manufacturers Association (CMA) devised an incentive scheme that required more frequent, expensive monitoring at plants that failed to meet the standards, and less at plants that exceeded the standards; and the American Petroleum Institute (API) came up with a similar system whereby noncomplying plants would have to install expensive retrofit equipment. By agreeing to these innovations, environmentalists were able to secure standards that set far tougher limits on emissions of far more chemicals than all similar rules in the two previous decades.

With that turning point, reg negs were established as an option that could produce breakthroughs on the most fiercely contested environmental rules. Since 1990, formal negotiations, as well as informal pre-regulatory discus-

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sions, have helped craft rules on such diverse issues as acid rain control and recycling of CFCs from auto air conditioners. Reg negs are currently in progress on reducing toxic emissions from coke ovens and on oil spill response plans for tankers in U.S. waters.

What do environmentalists have to gain from direct negotiation with industry? Although the traditional regulatory procedure has succeeded in producing reams of environmental rules that give the U.S. environment what protection it has today, much of the attraction lies in the fact that the conventional process can be virtually dysfunctional when the issue is highly controversial.

"In the classic mode of writing regs," says David Hawkins, an NRDC attorney and former EPA Assistant Administrator for Air, Noise and Radiation, "the EPA staff retire to chambers to be bombarded with conflicting, confusing recommendations from various points of view." Frequently, when the rule is issued, all sides file suit."

But what regulatory negotiation offers environmentalists is not just a way of circumventing this process; it is also a method that can achieve impressive environmental successes—creative, practical solutions that are environmentally stringent and yet cheap to implement. According to NRDC attorney David Doniger, who has participated in more environmental reg negs to date than any other negotiator, in negotiated rulemaking "environmentalists have sometimes been able to get as much as 98 percent of what we would have gotten if we'd written the rules ourselves, and far more than we could have hoped for had the current administration written the rules the 'normal' way."

William Becker, who has represented state and local air pollution control officials in several reg negs, believes that negotiation succeeds because it provides an opportunity to address each party's concerns directly. The resulting dialogue, he says, "often leads to dynamic solutions that a regulatory agency might not come up with by itself."

The best-known example of this process was not a reg neg in the classic sense, because it stemmed from a lawsuit rather than directly from a law. The suit was brought by the Grand Canyon Trust and the Environmental Defense Fund to limit pollution from Navajo Generating Station, a coal-fired power plant whose airborne emissions cause haze over the Grand Canyon. During negotiations last year, the parties agreed on a 90 percent reduction of the pollution emitted over the course of a year. This figure was much higher than the 70 percent monthly reduction backed by the President's Council on Competitiveness—and just as cheap to implement.

No matter how good the results, however, reg negs will never supplant traditional rulemaking. Indeed, the EPA may finalize 100 or more regulations in any given year, and use reg negs only two or three times. One reason is that the procedure is too labor-intensive to be used in most rulemakings. The parties are given a limited period to achieve consensus, so talks may take place as often as every other week over several months. Even for industry (to say nothing of state officials and nonprofit groups) the investment in time and personnel is substantial. Betty Anthony, who represented the API in 1991 reg negs on a cleaner-burning gasoline supply for the most polluted U.S. cities, calls the process "intense" and "grueling." "Any party considering reg negs must be prepared for a major commitment," she says.

The intensity of the reg neg process is a reflection of the high stakes all parties have in the outcome. Reg negs loom large in the regulatory landscape, in spite of being used in such a small minority of rulemakings, because they offer a means of resolving the most controversial and highly politicized issues. As Blake Early of the Sierra Club says, reg negs, like all negotiations, work "when all sides have something they want that's important to them." David Hawkins expresses it differently: negotiation works, he says, "when the parties at the table have the ability to inflict pain on each other."

In rulemakings, pain has traditionally been inflicted through lawsuits and the delays they cause. Environmentalists and state officials, therefore, are most likely to negotiate on issues where delay can lead to serious environmental harm. Industry, on the other hand, is most likely to negotiate on issues where delay can lead to higher costs.

However, even in the best of circumstances, regulatory negotiation is no panacea. Whether negotiated or litigated, pollution control is like baseball: it ain't over till it's over. A round of reg negs may produce agreement on an innovative, cheap, and environmentally protective rule, hailed by all parties as a breakthrough; but, as Early says, "it doesn't represent a success unless it holds up over time." He gives the example of the highly successful 1991 reg negs on cleaner-burning gasoline. Those negotiations led to consensus on a 15 percent cut in auto emissions of toxic compounds and the chemicals that form urban smog. Yet one of the signatories, the ethanol industry, is now lobbying the administration for a provision that would actually increase emissions of smog-forming compounds by 6 percent for every gallon of ethanol burned. "The ink was barely dry" on the compact, Early notes, when "the ethanol industry was seeking a special loophole in the final regulation that is clearly a violation of the negotiated agreement."

The undermining of an agreement the ethanol industry itself helped to craft is a reminder that regulatory negotiation, however effective it may be for certain issues, has not altered the basic climate of environmental advocacy. As Doniger puts it, reg negs "are ceasefires and truces along parts of an enormous front. Everywhere else, the battle rages on." ☐

# Reflections on Negotiated Rulemaking

## From Conflict to Consensus

By Stephen B. Goldberg

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Traditionally, federal government regulations have been developed under procedures established by the Administrative Procedure Act of 1946. Using in-house expertise and informal meetings with parties who will be affected by the rule, an agency will issue a proposed regulation. This is followed by an opportunity for public comment, usually in writing, and then agency promulgation of a final rule. As a practical matter, however, the "final" rule is anything but final, since it is often followed by lengthy judicial review. In 1984 Environmental Protection Agency Administrator William Ruckelshaus estimated that more than eighty percent of the Environmental Protection Agency's rules had been challenged in court and that approximately thirty percent of those rules had been significantly changed as a result of litigation.

Philip Harter, in a seminal article published in 1982 that was based on a report prepared for the Administrative Conference of the United States, suggested that the failure of the traditional rulemaking model to result in final rules in a timely fashion was primarily due to the adversarial nature of that model. Harter wrote:

> *The agencies and the private parties tend to take extreme positions, expecting that they may be pushed toward the middle. For example, an agency may propose a far more stringent regulation than it expects to issue ultimately because it expects*

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Negotiated

*the adversarial process to create considerable pressure for it to moderate its position. Moreover, if the agency tempers its original proposal, the agency appears reasonable and responsive.*

*The private participants tend to take extreme positions because they also expect to be drawn toward the middle as part of the adversarial process. Participants that oppose any regulation or that hope to obtain a minimally intrusive regulation may argue that no regulation is needed or that at most a weak one is required, and will tailor their evidence accordingly. Because the parties advocate the extreme, they may be reluctant to provide data to the agency and to each other because they fear the data may be misused or reveal weaknesses in the extreme position. Thus, it is frequently difficult for parties to join forces, and frontally address the factual and policy questions. Instead, the parties dig in and defend their extreme positions.*[1]

In response to these concerns, the Administrative Conference recommended[2] that federal agencies consider using negotiated rulemaking (sometimes referred to as regulatory negotiation or "reg-neg"). In this process the agency and all private parties with a significant stake in the proposed rule participate in facilitated face-to-face negotiations designed to produce a consensus. In these negotiations they have the opportunity, lacking in the adversarial process, to explore shared interests and differences of opinion, collaborate in gathering and analyzing technical information, generate options, and bargain and trade across those options according to their different priorities. If agreement is reached, it is published as the agency's notice of proposed rulemaking, and then the conventional review and comment process takes over. Because, however, most or all of the interested parties have participated in framing the proposed rule, there should be little critical comment and few judicial challenges.

The first agency to complete a negotiated rulemaking proceeding was the Federal Aviation Administration (FAA). In June 1983 a committee was convened by the FAA to negotiate a revision of flight and rest time requirements for domestic airline pilots. The existing rules had been in effect for approximately thirty years, and were substantially outmoded, but all previous FAA proposals to revise the rules had been withdrawn in the face of substantial opposition. On this occasion, however, representatives of airlines, pilot organizations, public interest groups, and other interested parties, meeting for three months as a negotiated rulemaking committee, reached agreement on a proposed rule, which was the basis of the rule ultimately adopted by the FAA and became effective without court challenge.

Between 1983 and 1989 negotiated rulemaking was used on more than a dozen occasions by seven other federal departments and agencies, including the Departments of Agriculture, Education, Interior, and Labor, plus the Environmental Protection Agency, the Federal Trade Commission, and the Nuclear Regulatory Commission. Complete agreements were reached in five negotiations and partial agreements in four additional negotiations. In those instances in which a partial agreement was reached, the agency used that agreement as the basis for its proposed rule. Judicial review was sought following two negotiated rules, and both rules were sustained, one with minor changes.[3]

Satisfied with the foregoing experience, Congress passed the Negotiated Rulemaking Act of 1990, explicitly authorizing and encouraging federal agencies to use negotiated rulemaking. The Negotiated Rulemaking Act establishes a framework for the use of negotiated rulemaking similar to that proposed by the Administrative Conference, but it does not preclude agencies from experimenting with other procedures for negotiated rulemaking.

Subsequent to the passage of the Negotiated Rulemaking Act, there has been increased interest in negotiated rulemaking, and it has been utilized by at least three additional agencies—the Federal Communications Commission, the Farm Credit Administration, and the Coast Guard. Most recently, on September 30, 1993, President Clinton issued Executive Order 12866, "Regulatory Planning and Review," directing each agency to explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking. Additionally, the president directed each executive department and selected agencies (Environmental Protection Agency, General Services Administration, Small Business Administration, and Office of Personnel Management) to conduct at least one negotiated rulemaking within the next year or explain why it would not be feasible to do so.

In light of these developments, it appears likely that negotiated rulemaking will be part of the regulatory mechanism for the foreseeable future. It is thus important, for both federal agencies and those attorneys who practice before them, that the negotiated rulemaking process be carried out in an efficient and effective manner, so as to maximize the likelihood of achieving agreement on a rule that is acceptable to all interested parties.

I recently participated, as a consultant to one of the parties, in a negotiated rulemaking conducted by the Federal Communications Commission relating to mobile satellite services.[4] The procedure was successful in that technical information was exchanged and consensus was reached on many issues. On the other hand, the negotiated rulemaking advisory committee did not reach consensus on one of the major issues before it—a rule to maximize the sharing of available spectrum by providers of mobile satellite services. Proceeding on the assumption that more is learned by analyzing the reasons for failure than by praising success, I here present my comments on the procedures used by the agency in this negotiated rulemaking, together with suggestions for improvement.

> **It appears likely that negotiated rulemaking will be part of the regulatory mechanism for the foreseeable future.**

## Negotiated Rulemaking Committee

The agency selected participants to represent all interests affected by the proposed rules, convened representatives of those interests to serve as a negotiated rulemaking advisory committee, and nominated a facilitator for the committee. The agency advised the committee that it had ninety days within which to attempt to reach consensus on proposed rules. At its first meeting the committee approved the proposed facilitator, set up three working groups to address three central categories of issues, and approved working group facilitators, each of whom had also been nominated by the agency. Each of the facilitators had technical expertise on the issues under consideration, as well as experience in chairing committees, but none had dispute resolution experience as mediator or arbitrator.

Most of the industry participants were represented by a team of lawyers and technical experts. The agency was represented by a senior technical expert, who was assisted by agency attorneys and members of the agency technical staff. All the industry participants believed that if no consensus was reached on proposed rules, the agency representative would play a significant role in the agency's internal deliberations regarding proposed rules. The agency representative was not, however, authorized to communicate the agency's views on the merits of the proposals made by industry representatives or the agency's likely action in the event no consensus was reached. Accordingly, he did not do so.

Two of the working groups reached consensus on virtually all of the issues before them; the third working group, which dealt with the central issue of spectrum sharing, did not reach consensus. The consensus views of the former two groups were transmitted to the agency in the form of proposed rules and recommendations, while the conflicting views of the members of the third working group were transmitted to the agency without comment by the committee. On February 18, 1994, the agency issued a notice of proposed rulemaking, adopting the committee's recommendations on those matters about which a consensus was reached. On the key issue of spectrum sharing, the agency put forward a proposal, based in substantial part on input received in the negotiated rulemaking, and requested comment on that proposal.

**Comments.** There were, in my view, three central reasons for the failure of the negotiated rulemaking committee to reach consensus on spectrum sharing.

**1. Differing views regarding the effect of a failure to reach consensus.** The agency was unwilling to indicate which, if any, of the spectrum sharing proposals advanced by the parties it would adopt in the absence of consensus. Nor was the agency willing to indicate which, if any, of those proposals were wholly unacceptable. As a result, each of the industry participants was optimistic that, absent consensus, its approach would be adopted by the agency. Accordingly, none was willing to make the compromises necessary to reach consensus.

The tendency of disputants—and their lawyers—to be optimistic about a decision in their favor is well known. Accordingly, an agency that is conducting a negotiated rulemaking should provide the parties with a realistic view of its likely action if consensus is not achieved. (In the jargon of the negotiation world, this enables each party to know its BATNA—Best Alternative to a Negotiated Agreement.) With such knowledge, a negotiator can assess each proposal against its BATNA, and decide whether accepting the proposal would be better or worse than its BATNA. Absent such knowledge, accepting any proposal may be seen as unduly risky, particularly if one is optimistic about an unknown BATNA.

**One obstacle to selecting a facilitator with agreement-reaching skills may be that it is difficult for the agency to locate potential facilitators who possess such skills.**

There are, however, two potential problems for an agency that wishes to provide participants to a negotiated rulemaking with knowledge of the agency's likely action absent consensus. One problem is that if the agency states its proposed rule absent consensus in a definitive manner, and a significant interest would benefit from that proposed rule, that interest would feel little incentive to make any concessions, thus dooming hopes for a consensus. Similarly, disfavored interests might see little prospect of persuading the agency to alter its position, and have little desire to participate in a process with a foregone conclusion.

Still, this problem can be dealt with. An agency that wishes to encourage the search for a consensus, while at the same time providing the affected interests with a realistic view of their BATNA—the agency's likely action in the absence of consensus—will state its likely action in slightly tentative terms: "This is our present view of what we will do absent consensus, but that view may be altered by what we learn as a result of the negotiated rulemaking process. In any event, we will accept as a proposed rule any consensus outcome that is consistent with our governing statute and satisfies our fundamental interests in this area, which are..."

A more difficult problem exists for the agency that has not decided, or cannot decide, what action it will take absent consensus. Even in that situation, however, there may be agency agreement on some fundamental principles that will guide its action, and the agency should advise the participants of those principles. It should also notify the participants if proposals are put forward by one of them that do not satisfy those principles.[5]

Suppose, however, that the agency is too divided or too unsure of the principles that will guide its action absent consensus to be able to advise the participants even which proposals are unacceptable. Does that mean that the situation is inappropriate for negotiated rulemaking? Not necessarily, but the agency should have a realistic view of what is likely to be achieved by negotiated rulemaking in this situation. Initially, the prospects for achieving consensus on hotly contested issues are unlikely to be bright. On the other hand, the agency can profit substantially from being present and participating in the direct and immediate exchange of fact and opinion among the parties that takes place in a negotiated rulemaking. As the Administrative Conference has pointed out:

> *Agencies typically receive a lot of both solicited and unsolicited input from affected parties during the pre-proposal stage of rulemaking. Frequently, data and opinions are received from affected parties sequentially: party A submits data on its industry's products or services; then party B, in a separate submission, describes the problems with the products or services provided to the public by the industry. Parties A and B do not communicate directly with each other, and are usually more interested in building a record that states their best positions rather than reaching some practical accommodation on the issues. The agency staff is presented only with polar views from the regulated community and the interested public. Staff must then fashion a regulation that is statutorily sound, practical, and capable of implementation, but without much "reality testing." This means that the rule is not subjected to any procedure whereby agency staff can learn the practical consequences of one or more alternatives under consideration, through observing reactions and interactions among potentially affected parties. In a negotiated rulemaking proceeding, representatives of all of the affected interests come together and can hear and discuss one another's positions and concerns. The give-and-take of the ne-*

*gotiation process can provide all participants, including the agency, with a realistic opportunity to have their assumptions and data questioned and tested by parties with other viewpoints. The result will be a more effective rule.*[6]

The central question for the agency in the foregoing situation is not whether it will profit from a negotiated rulemaking procedure, but whether the advantages of negotiated rulemaking warrant the costs that the agency will incur in conducting it, and the parties will incur in participating in it. There are many factors that should be considered in resolving this question,[7] but one of the most important is whether the agency is able and willing to provide interested parties with a good sense of the rule it will propose absent consensus, since, if it is not, the most cited benefit of negotiated rulemaking—obtaining consensus and so avoiding post-rule litigation—is less likely to be achieved.

**2. The presence of agency personnel who will participate in the formulation of the agency's proposed rule absent consensus.** While the agency in this negotiated rulemaking was unwilling to advise the participants what its proposed rules would be absent consensus, all participants believed that in the absence of consensus the agency's representative to the negotiated rulemaking would be a key player in the agency's decision-making process regarding its proposed rules. As a result, the participants tended to take advocacy positions designed to persuade the agency representative, rather than compromise positions designed to win the support of the other participants—the very dynamic that characterizes traditional rulemaking, and that the Negotiated Rulemaking Act sought to avoid. (Some attempts to find a compromise solution took place in private meetings among the participants, but the dialogue at public committee meetings was almost entirely of an advocacy nature.)

There are two ways to deal with this problem. The most effective is for the agency to make clear what its proposed rule will be absent consensus—a point already made. To the extent the agency makes such a commitment, and the participants believe that the agency will follow through on that commitment, they are unlikely to devote much energy to attempting to persuade the agency representative that the agency should take a different approach.

To the extent that the agency is incapable of providing the participants with a clear view of its proposed rule absent consensus, it should both ensure and make plain to the participants that its representative in the negotiated rulemaking will not play a significant role in the agency's decision-making process regarding its proposed rule. The agency representative should be directed to convey to the decision makers what the agency staff learned during the negotiated rulemaking, but should neither make a recommendation regarding a proposed rule, absent consensus, nor play a substantial role in developing such a rule on behalf of the agency. This limited role for the agency representative should reduce the participants' inclination to seek to persuade the agency representative of the merits of their respective positions, and encourage them to focus primarily on the search for a mutually acceptable rule.

There is, to be sure, some cost to the agency if its representative in the negotiated rulemaking does not play a significant role in the agency decision-making process, since that person may have useful insights into what would be the best rule. The objective of negotiated rulemaking is not, however, to develop what the agency would view as the "best" rule, but rather to achieve consensus among the interested parties and the agency on a mutually acceptable rule that will not be the subject of interminable litigation. Since the presence of an agency representative who will be influential in the agency decision-making process is inimical to that goal, the agency representative should not possess such influence.

**3. Selection of the facilitators on the basis of technical expertise.** As previously noted, the facilitator for the advisory committee in this negotiated rulemaking was selected primarily on the basis of his technical expertise in the subject matter of the rules, and his experience in chairing committees dealing with related subjects. He did not have prior experience as a mediator, however, hence was unprepared to play that role effectively when the participants reached impasse. In my judgment, the agency would have done better to select the advisory committee facilitator on the basis of prior mediation experience rather than on the basis of technical expertise.[8]

In determining the qualifications of a neutral for a dispute resolution procedure, it is important to focus on the neutral's role in that procedure. If the neutral is to have the authority to issue a final and binding decision, as in arbitration, technical knowledge of the context within which the dispute takes place is valuable. Absent such knowledge, there is an increased risk that the neutral's decision will be ill-informed, to the detriment of the parties who are bound by that decision.

If, however, as in negotiated rulemaking, the neutral's function is not to issue a final and binding decision but to assist the parties in reaching agreement, a different type of knowledge is called for. The ability to chair and direct the work of the negotiated rulemaking committee is valuable, but not sufficient. In addition, the facilitator should possess those skills that aid in bringing disputing parties to agreement.

For example, the facilitator should be a skilled investigator, capable of determining the interests or concerns that underlie the parties' stated positions. The facilitator should be creative, capable of working with the parties to shape their differing interests into a mutually acceptable proposal. The facilitator should also possess persuasive powers, so that he or she can overcome the parties' natural reluctance to abandon the positions that have brought them to impasse. Finally, the facilitator should be indefatigable, willing to devote the long hours in both public and private meetings that may be necessary to assist disputing parties to reach consensus.

The possession of subject matter knowledge by the facilitator may be valuable in that he or she will be more quickly capable of a sophisticated understanding of the subject matter of the proceeding than a facilitator who does not initially possess such knowledge. Still, that is a limited advantage, since a skilled neutral is typically a "quick study," capable of speedily assimilating information. Furthermore, a negotiated rulemaking typically lasts for some months, thus providing more than ample time for the neutral who possesses the necessary agreement-reaching skills to acquire enough subject matter knowledge to be able to use those skills effectively.

Perhaps the sole situation in which agencies should insist upon technical knowledge in the substantive issues underlying the negotiated rulemaking is, as the Administrative Conference has suggested, when the technical issues are so complex that a neutral cannot effectively understand and communicate the parties' positions without it.[9] Even in that situation, the agency might do well to use a team of facilitators, one member having technical expertise and the other having agreement-reaching expertise. While doing so will increase the costs of the negotiated rulemaking, the agency must weigh that increase against the increased likelihood of consensus that flows from involving in the rulemaking process someone whose central professional skill consists of aiding disputing parties to reach consensus.

One obstacle to selecting a facilitator with agreement-reaching skills may be that it is difficult for the agency to locate potential facilitators who possess such skills. Furthermore, the agency may not have the funds to engage a skilled facilitator if he or she is not a government employee.

Each of these obstacles can be dealt with. The Administrative Conference maintains a roster of neutrals skilled in conducting dispute resolution procedures, including negotiated rulemaking. Included on this roster are both nongovernment neutrals and personnel from the Federal Mediation and Conciliation Service, who are available at a nominal fee to other federal agencies. In the event that the agency (and the parties) prefers to select a facilitator who is not a government employee, the parties can provide the necessary funds through a contribution either to the agency or to the Administrative Conference. All this is spelled out and authorized in sections 566(c), 568(a)-(b), and 569(a)-(c), (g) of the Negotiated Rulemaking Act.[10]

The need for agreement-reaching skills may be less crucial for the facilitators of the working groups than for the facilitator of the advisory committee itself. Typically, although not always, the issues assigned to a working group will be more technical, and less policy-oriented, than the issues before the advisory committee. Thus the issues before the working group should be more susceptible of agreement on technical grounds than are the issues before the advisory committee. To the extent this is so, the facilitators of the working groups may be chosen primarily for their technical knowledge and organizational skills, though agreement-reaching skills would be a plus, and should not be ignored. If assistance in reaching agreement is necessary for the working groups, that assistance can be provided by the advisory committee facilitator. The freedom to select working group facilitators on the basis of their technical knowledge, rather than their agreement-reaching skills, may be valuable to an agency which possesses more ready and cost-free access to facilitators with technical knowledge than to those with agreement-reaching skills.

**Conclusion.** In sum, my experience in the negotiated rulemaking on mobile satellite services suggests the following advice for agencies that will be conducting negotiated rulemaking in the future:

1. If possible, provide the participants in the negotiated rulemaking with a realistic view of the agency's proposed rule in the absence of consensus. At the very least, the agency should inform the participants of the principles that will guide its decision absent consensus. The agency should also advise the participants which, if any, proposals made by them are totally unacceptable. An agency that can provide participants with none of this information should recognize that the prospects of consensus on highly-contested issues will diminish. Hence the agency must decide whether the advantages of negotiated rulemaking in this situation—superior information gathering and some prospect of consensus—warrant the costs of this procedure.
2. The agency representative in the negotiated rulemaking should not play a significant role in the agency's decision-making process on the proposed rules absent consensus, and the parties should be made aware that he or she will not do so. This will discourage them from treating the negotiated rulemaking as an opportunity to persuade the agency, through its representative, of the soundness of their respective positions, and encourage them to seek consensus on a rule acceptable to all.
3. The agency should select the facilitator for the negotiated rulemaking advisory committee on the basis of his or her mediation skill and experience, rather than on the basis of technical expertise in the subject matter of the proposed rule. The possession of mediation skill and experience is less crucial for working group facilitators, and they may be selected primarily on the basis of technical expertise and organizational skills if doing so is more convenient or less costly for the agency.

**Notes**

[1] *Negotiating Regulations. A Cure for Malaise*, 71 Georgetown L J 1

[2] Recommendation 82-4, 1 CFR Sec. 305-82.4

[3] *Natural Resources Defense Council v. EPA*, 907 F.2d 1146 (D.C. Cir. 1990), *Safe Buildings Alliance v. EPA*, 846 F 2d 79 (D C Cir. 1988)

[4] The views contained in this article are the author's own and do not reflect the views of the client.

[5] *See* Administrative Conference of the United States (hereafter "Administrative Conference" or "ACUS") Recommendation 85-5, 1 CFR 305.85 5; Harter, *Experienced Practitioner Offers Guidance to Participants in Negotiated Rulemaking*, 2 Alternative Dispute Resolution Reporter 80 (3/3/88). (Both these documents are reprinted in the *Negotiated Rulemaking Sourcebook* (hereafter "Sourcebook"), pp. 17, 547 (U.S. Government Printing Office, 1990)).

[6] Pritzker and Dalton, Sourcebook 4

[7] *See* section 563(a) of the Negotiated Rulemaking Act of 1990, 5 U.S.C. 563(a)

[8] *See* also Harter, *Negotiating Regulations: A Cure for Malaise*, 71 Georgetown L. J.#1, 77–79 (1982).

[9] Sourcebook, 242

[10] *See* also Sourcebook, pp. 233–314

22 ENVIRONMENTAL LAW REPORTER 10647-10654 (1992)

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# Regulatory Negotiations: A Practical Perspective

by Ellen Siegler

You have just received a telephone call from an U.S. Environmental Protection Agency (EPA) official asking whether your company or trade association is interested in participating in a regulatory negotiation to develop a new or amended regulation that the Agency will issue under an environmental statute. Or your client asks your advice on whether to participate. What will you say? It is increasingly likely that you may receive such a call.

Regulatory negotiation (reg-neg) is a process that developed years ago but has been slow to gain acceptance. Reg-neg is a negotiation in which representatives of a governmental agency and representatives of various interests affected by a regulatory initiative attempt to develop the initiative together in an open forum. In less objective terms, reg-neg may be viewed as one of the following: (1) a process by which representatives of different points of view try to reach a balanced resolution of complex regulatory matters; (2) a process in which a group of people, most of whom do not talk to each other routinely, engage in a seemingly endless effort to wear each other down to achieve self-interests of their constituents; or (3) a messy, time-consuming process that can produce an outcome that all interests can live with.

While an interested party might enter into a reg-neg with a preconceived notion that one of these processes will prevail, it is likely that, during and after participation, the party's perspective will change with the ebbs and flows that are inevitable in negotiating mechanisms. Ideally, an agreement is reached that results in a reasonable regulation that is less likely to be the subject of a lengthy comment process or a legal challenge than a regulation that is developed through the normal notice-and-comment rulemaking process.

Recently, reg-neg has gained popularity, especially within EPA. William Rosenberg, EPA's Assistant Administrator for Air and Radiation, has expressed a desire to make greater use of the process in the future. EPA's Office of Air and Radiation has conducted a number of reg-negs over the last several years. For example, in 1986 participants successfully concluded a reg-neg on new source performance standards under the Clean Air Act for residential wood heaters.[1] Another reg-neg that began in September 1989, is expected to result in a regulation pursuant to Clean Air Act §112(d), to reduce emissions of hazardous air pollutants from equipment leaks at chemical facilities (equipment leaks reg-neg). Although the equipment leaks reg-neg is still technically in progress, agreement on the regulatory language has been reached.[2] A reg-neg on implementation of the reformulated gasoline, antidumping, and oxygenated gasoline provisions of Clean Air Act §211(k) and (m) (fuels reg-neg) resulted in an agreement on the principles of a regulation in August 1991.[3] And a reg-neg to develop regulations, pursuant to Clean Air Act §112, restricting coke oven emissions from by-product and nonrecovery coke oven batteries is currently in progress.[4]

These reg-negs, in part, have led parties to greater confidence in the process and a greater willingness to participate in reg-negs. In addition, the Administrative Conference of the United States has promoted the reg-neg process for many years.[5] Finally, Congress gave momentum to the acceptance of reg-negs by enacting the Negotiated Rulemaking Act of 1990, discussed below.

Published articles on reg-negs have typically been brief theoretical descriptions of the process or scholarly coverage addressing such issues as whether the reg-neg process produces regulations that are in the public interest and meet statutory requirements, and whether the courts should give greater deference to regulations resulting from reg-negs differently than other regulations.[6]

This Dialogue is intended to give readers a practical perspective on the reg-neg process and assumes that the reg-neg process will increasingly be used in the future—especially by EPA. First, the Dialogue briefly describes the reg-neg process. Next, it identifies matters to consider in evaluating whether your client or organization should participate in a reg-neg. Finally, the Dialogue describes what to expect, and recommends ways to most effectively participate if your organization or client decides to participate.

## Reg-neg Fundamentals

### *How Does a Reg-neg Begin?*

There is no set pattern for initiating a reg-neg. The decision to convene a reg-neg to enhance promulgation of an upcoming regulation may originate with EPA, or with one of the parties interested in the regulation. If a party you represent is likely to be directly affected by the regulation under consideration, your client may first receive an informal inquiry regarding tentative interest in the process. The contact may be made by an agency official or by a facilitator who may assist in conducting the reg-neg if it proceeds. All entities believed to have a direct interest in the regulation will be contacted to determine whether those likely to participate represent a balanced mix of viewpoints. If the sub-

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[1] 51 Fed. Reg. 34672 (1986) (to be codified at 40 C.F.R. pt. 60) (notice of results of rulemaking negotiation Sept. 30, 1986).

[2] 56 Fed. Reg. 9315 (1991) (to be codified at 40 C.F R. ch. I) (notice of agreement on negotiated regulation Mar. 6, 1991).

[3] 57 Fed. Reg. 13416 (1992) (to be codified at 40 C.F.R. pt. 80) (Regulation of Fuels and Fuel Additives; Standards for Reformulated and Conventional Gasoline, Supplemental Notice of Proposed Rulemaking, Apr. 16, 1992).

[4] 57 Fed. Reg. 1730 (Jan. 15, 1992).

[5] In 1982 and 1986, the Administrative Conference adopted recommendations intended to encourage the use of reg-negs by federal agencies.

[6] One compilation of articles on the reg-neg process is DAVID M. PRITZKER & DEBORAH S. DALTON, NEGOTIATED RULEMAKING SOURCEBOOK (1990).

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ject of the reg-neg involves environmental issues under EPA's jurisdiction, EPA or the facilitator probably will call representatives of the regulated community, states, environmental groups, and other companies and trade associations who might have an interest in the issues.[7]

If sufficient interest is shown, EPA may publish notice in the *Federal Register* of one or more public meetings to further explore whether it would be fruitful to conduct a reg-neg and, if so, what specific issues the reg-neg should address. If the preliminary meetings reveal that enough entities who represent a balance of the major interests potentially affected by the regulation to be negotiated are sufficiently interested, EPA will publish another *Federal Register* notice announcing its intent to begin a reg-neg and invite the public to participate.

### *Statutory Framework*

Reg-neg procedures must comply with the requirements of the Federal Advisory Committee Act[8] and the Negotiated Rulemaking Act.[9] Further, the procedural requirements of the statute under which the regulation is to be promulgated and the relevant portions of the Administrative Procedure Act[10] must be satisfied.

When enacted, the Negotiated Rulemaking Act did not represent a new grant of authority to the agencies. Rather, it encouraged—but did not require—the use of reg-negs, and it established specific procedures for conducting reg-negs by federal agencies.

Most of the procedures established in the Act are those that EPA previously followed. The Act requires a determination that negotiated rulemaking is in the public interest[11] and requires EPA to publish a notice in the *Federal Register* announcing the formation of a committee and allowing members of the public to apply for membership.[12] The Act specifies that representatives of a federal agency in a reg-neg "shall participate . . . with the same rights and responsibilities as other members of the committee . . . ."[13]

Among other things, the Negotiated Rulemaking Act provides that an agency may "pay for a [negotiating committee] member's reasonable travel and per diem expenses, expenses to obtain technical assistance, and a reasonable rate of compensation" under prescribed circumstances.[14] Moreover, the Act makes it clear that an agency's decision to establish or terminate a negotiating rulemaking committee is not subject to judicial review.[15]

The Negotiated Rulemaking Act also resolves a question that has been debated by several commentators: whether courts reviewing a regulation that was the product of negotiated rulemaking should give greater deference to the validity of that rule on review.[16] The Act provides:

> A rule which is the product of negotiated rulemaking and is subject to judicial review shall not be accorded any greater deference by a court than a rule which is the product of other rulemaking procedures.[17]

### *How Are Reg-negs Conducted?*

Once a reg-neg has begun, it is conducted in formal meetings open to the public, in which the participants sit as a panel and a facilitator presides over the sessions. The federal agency involved is one participant, just like the other parties. The Federal Advisory Committee Act requires that these formal sessions be open to the public and that minutes be taken.[18] Although members of the public who are not formal participants are often encouraged to ask questions or provide pertinent data and viewpoints, this may not always be the case. However, Federal Advisory Committee Act §10(a)(3) requires that, with four exceptions prescribed by the administrator of General Services, interested persons must be given some opportunity to express their views.

During the formal sessions, the facilitator encourages participants to brainstorm on pertinent issues, and to suggest ideas to the rest of the group even if the ideas have not been thought through completely, documented carefully, or cleared with clients. The idea is to create an atmosphere in which ideas flow freely.

Much of the work of a reg-neg takes place outside of the formal sessions. Generally, coalitions are formed, and members of these coalitions communicate before, after, and at breaks in the negotiating sessions. Coalitions may consist of representatives of affected industries, environmental groups, states, or others.

### *What Are the Ground Rules for a Particular Reg-neg?*

Reg-neg ground rules are organizational protocols to which the participants agree during the first reg-neg session after any preliminary sessions for soliciting general interest and scoping of issues. Although the facilitator may provide copies of protocols that have been used in other reg-negs as useful examples, the participants adopt rules that will govern their reg-neg. These rules are procedural and encompass such issues as how often, and where, reg-neg meetings will occur; which documents used in the reg-neg will be placed in a public record or records; how it will be determined whether a consensus has been reached (i.e., will agreement of every participant be required, or will agreement of all interests represented be sufficient?); and when negotiations will be concluded.

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[7] Facilitators are used to encourage prospective participants to express their views and concerns more openly than they might to an EPA representative.

[8] 5 U.S.C. app. §10(a) (1988). For example, prior to EPA's *Federal Register* notice of the beginning of a reg-neg, the negotiating group must be chartered under §9(c), and will have been approved by the Office of Management and Budget. *Id.*

[9] 5 U.S.C.A. §581 (West Supp. 1992).

[10] 5 U.S.C. §500, ELR Stat. Admin. Proc. 001 (1988).

[11] 5 U.S.C.A. §583(a) (West Supp. 1992).

[12] *Id.* at §584(a).

[13] *Id.* at §586(b).

[14] *Id.* at §588(c). The prescribed circumstances are that:

> (1) such member certifies a lack of adequate financial resources to participate in the committee; and (2) the agency determines that such member's participation in the committee is necessary to assure an adequate representation of the member's interest.

[15] *Id.* at §590.

[16] *See, e.g.*, Patricia M. Wald, *Negotiation of Environmental Disputes: A New Role for the Courts?*, 10 Colum. J. Envtl. L. 1, 22 (1985), *reprinted in* Pritzker & Dalton, *supra* note 5 at 762. In her article, Judge Wald disagrees that judicial review of negotiated rules should be limited. She also responds to contrary views expressed in Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 Geo. L.J. 1, 102-103 (1982), *reprinted in* Pritzker & Dalton, *supra* note 5 at 431, 532-533.

[17] 5 U.S.C.A. §590 (West Supp. 1992).

[18] 5 U.S.C. app. §10(a) (1988).

### *The Dynamics of Reg-neg Sessions*

Compared to normal notice-and-comment rulemaking, reg-neg is a messy process. The reasons for this are many. First, most participants in a reg-neg have never participated in one before and do not know either the ground rules or how to conduct the reg-neg most effectively on behalf of their constituents. Second, it is a process in which parties with great cultural differences not only must present their views, but must be prepared to defend them against a perceived enemy. A third difficulty is that the reg-negs are unpredictable.

At the inception of a reg-neg, it is not always clear exactly what issues are amenable to reg-neg solutions. Therefore, initial concepts as to what issues will be addressed and what general approach should be taken will need to be reevaluated during the process and, possibly, replaced by other issues and approaches. Moreover, at the outset some participants may not have identified their key interests and concerns. No one knows at the outset what the end result will look like or how it will be achieved. A reg-neg is a negotiation that will fluctuate between periods of harmony and cacophony, simplicity and complexity, and relative organization and disorganization. It is difficult to say at the beginning, and sometimes well into the process, whether the negotiations will progress to completion.

Objective evaluations of the parties' interests are an important factor in whether the reg-neg process will reach completion. If the parties keep their overall objectives in mind and feel that they can achieve many of them, even though they recognize that compromise on other issues will be necessary, this will help sustain the effort.[19] In other words, focus on the package as a whole should be maintained. Also, participants must be open and willing to identify the real issues and to look for creative approaches to resolving these issues. Other, less objective factors also can be influential. For example, if the negotiations have continued for a long time, participants may feel a personal stake in reaching an agreement. They may begin to fear that they will be unable to justify—to themselves, to the home office, or to the client—the expenditure of considerable amounts of time, energy, and money that have been devoted to the process unless there is a resulting product.

### *What Happens Outside of the Negotiating Room?*

The short answer is: a great deal. Before and after the formal negotiating sessions, and during breaks in the negotiations, the participants meet with their constituents and allies to collect data and prepare position papers, proposals, or counterproposals. In the days or weeks between sessions, the participants whose interests are allied prepare, exchange, and revise written documents in an effort to provide a united front during the next session. During these periods, some participants—particularly trade associations—must spend time and effort getting the necessary approvals from constituents because multiple oversight committees may be involved and members' views may vary widely.

### *How Does a Reg-neg End?*

One way a reg-neg can end is if negotiations reach an impasse and the participants agree that it is unlikely that the impasse will be broken. Another way a reg-neg can end is if one interest or, in some cases, a single participant decides to withdraw.

Another conclusion is for the reg-neg to be a success. Successful conclusions can take one of several forms, which generally will be incorporated into an agreement signed by the parties at the end of the process. The end-point may be an agreement that the language of a regulation and/or preamble to be incorporated into a proposed regulation is agreeable. In the equipment leaks reg-neg, for example, final agreement will not be reached until the preamble is satisfactory to all participants. Agreement on the regulatory language was reached in 1991, and the parties entered into an interim agreement.[20] Or it may be that a regulatory framework or set of principles will be the end product, as occurred in the fuels reg-neg.

### *The Agreement*

The typical agreement ending a successful reg-neg[21] will involve the signatories making commitments to each other. For example, EPA may agree to propose a regulation consistent with an agreement in exchange for the remaining participants' agreement not to submit adverse comments on the proposal. Also, the agreement may state that, if EPA promulgates a final rule consistent with the agreement, the other parties will not bring legal challenges to the rule.[22]

Only those entities whose representatives have signed the agreement are bound by the agreement. If a trade association participates on behalf of its members and only the association signs the agreement, then only the trade association is bound. The association's members may submit adverse comments and challenge the final rule.[23] Similarly, an environmental group that has participated and signed the agreement binds only itself, not other environmental groups whose interests may be the same or related. The expectation is that a trade association or an environmental group will represent adequately the interests of its members or constituents. Thus, even though the association and group members or constituents maintain their individual rights, they should have little reason to challenge the outcome if their organizations have been effective.

If members or constituents wish their organization to retain bargaining power for future reg-negs or other negotiations, they may choose not to challenge an outcome that they do not believe is completely satisfactory, even though they retain the rights to do so. If EPA perceives that a trade association or other group cannot be relied on to represent the interests of its members or constituents in a way that minimizes comments and litigation, the Agency or other parties may decide not to participate with that group in a future reg-neg or other negotiation.[24] Similarly, a reg-neg participant's efforts outside the reg-neg process to effect changes in elements contained in the reg-neg agreement, such as by legislation or through the Executive Branch, are likely to be viewed as acts of bad faith, even if the actions are not necessarily precluded by the language of the agreement.[25]

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[19] Whether this will occur depends, to some extent, on the existence of a variety of issues that the parties can trade.

[20] *See supra* note 2

[21] In some cases, EPA and other parties may consider that a reg-neg is successful even if no agreement is reached. For example, if the process has narrowed the number of issues that may be litigated, then the expenditure of time and resources may be outweighed by a reduction in uncertainty of the outcome.

[22] The Administrative Procedure Act (APA) precludes EPA from making commitments with respect to the content of the final rule. 5 U.S.C. §553(c), ELR STAT. ADMIN. PROC. 004 (1988). Otherwise, the Agency would deprive persons not involved in the reg-neg of a meaningful opportunity to have their comments considered.

[23] *See* Philip J. Harter, *The Role of Courts in Regulatory Negotiation—A Response to Judge Wald*, 11 COLUM. J. ENVTL. L. 1, 60 (1985), *reprinted in* PRITZKER & DALTON, *supra* note 5 at 776.

### How to Decide Whether to Participate in a Reg-neg

Participating in a reg-neg is resource-intensive, time-consuming, and stressful. Thus, interested parties need to determine whether there are likely to be sufficient offsetting benefits to make participation worthwhile.

#### *Identifying the Available Options*

The first step in deciding whether to participate in a reg-neg is to identify the range of options that are available to your client or organizations.[26] The most obvious option to reg-neg participation is waiting for EPA to issue a proposed rule and then commenting, thus reserving the right to bring a legal challenge if the final rule is unacceptable. Other options that may be available include meeting with EPA officials and presenting your views prior to the Agency's proposal of a rule, and participating in focus groups that EPA may convene to solicit opposing views, in an informal setting, before proposal. These options are not necessarily mutually exclusive.

Identifying whether some of these options are available may require discussing them with EPA, and will vary depending on how important the Agency believes the issues are, whether sufficient time is available, and other factors. For example, when EPA solicited interest in the fuels reg-neg, it made it clear to potential participants that the officials who were responsible for developing the regulation within 12 months of enactment of the Clean Air Act amendments of 1990[27] would not have time to meet privately with every organization having an interest in the issues involved. This may have induced some entities to participate in the reg-neg.

#### *Evaluating Reg-neg Against Other Options*

After identifying the available options, it is useful to analyze them by asking several questions. If you choose an option other than reg-neg: (1) Is EPA more, or less, likely to propose a regulation favorable to your organization or client's position than if you participated in a reg-neg? (2) If EPA's response is likely to be favorable to your organization or client's position, is it likely to be challenged by environmental groups or others whose interests are adverse to your constituent's? (3) And, if a challenge is likely, will EPA be able to support its decision well enough to withstand judicial review? If the answers to these questions lead to the conclusion that a favorable regulation will be proposed, made final (in the absence of, or despite, adverse comments), and probably will withstand legal challenge in the event that litigation occurs, there may be little to be gained by participating in a reg-neg. However, if there is considerable uncertainty, give further consideration to participating in a reg-neg.

First, attempt to determine whether there is a reasonable expectation that a reg-neg will be successful. Is there sufficient information for resolution of the issues? Is there a manageable group of parties who have an interest in negotiating and are likely to negotiate in good faith? Is there a statutory or other deadline that will help to produce a successful result? These are the same questions that EPA will be asking itself before initiating a reg-neg; but your conclusion may be different from EPA's.[28] If indications to these preliminary matters point to a reasonable probability of success, consider the aspects of reg-negs described below to help you decide whether the reg-neg is right for your client or organization.

☐ *Possibility of a More Workable, Reasonable Regulation.* The nature of the reg-neg process, in comparison with the usual notice-and-comment process, can lead to a more workable regulation. In the context of a series of thoughtful discussions among interested parties and EPA officials responsible for developing a regulation at the pre-proposal stage, EPA gains a better understanding of the practical, legal, and policy issues involved in a regulation before the Agency's positions have hardened. This should lead to a better rule and, in EPA's view, is likely to enhance voluntary compliance.[29]

In developing a regulation through the usual process, EPA may not be aware of aspects of a regulation that will present serious practical problems and, thus, may overlook them. If they are identified in comments, it may be more difficult to address them than it would be prior to proposal. These issues also may be amenable to reg-neg solutions because parties whose general interests are adverse to industry's interests may not care how such issues are resolved or may be willing to trade them for favorable resolution of other issues. Finally, there is the possibility that reg-neg discussions may reveal that parties may have misunderstood the issue or each other's positions and, accordingly, that no real disagreement exists between them.

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[24] EPA is likely to realize, however, that a consensus organization cannot identify and resolve issues specific to every member. Thus, a member's comments on such an issue, or even a subsequent legal challenge, will not necessarily be viewed as bad faith or ineffective negotiation.

[25] Such efforts by ethanol interests in connection with the fuels reg-neg have generated anger in the environmental community. At a public hearing conducted by EPA on June 9, 1992, the Natural Resources Defense Council (NRDC) accused the ethanol industry of violating the fuels reg-neg agreement in letter and spirit. Written statement of David D. Doniger, NRDC, on EPA's Supplemental Proposed Rules for Reformulated Gasoline (June 9, 1992). EPA Docket A-91-02, Document No. IV-F-33. It remains to be seen whether this will affect the willingness of environmental groups or EPA to participate with the ethanol industry in future negotiations.

[26] For this Dialogue, the assumption is that an agency will engage in rulemaking, and the range of options relate to participation in a rulemaking. In some cases, other options may be available, such as suggesting that the agency address an issue through guidance rather than a regulation, or attempting to convince the agency that no rule is necessary. This Dialogue does not discuss these latter options.

[27] Pub. L. No. 101-549, 104 Stat. 2399 (1990) (codified as amended at 42 U.S.C. §§7401 to 7671q).

[28] A frank discussion with the facilitator that EPA has engaged to explore these issues during the convening period will be helpful to you in resolving these issues.

[29] *See supra* note 3.

An example of an issue in the fuels reg-neg that was resolved in this manner was the inclusion of an option for compliance with fuel specifications by averaging, rather than by gallon-for-gallon compliance.[30] At first, other participants did not appear to realize that this was a significant issue for the petroleum industry. After the importance of the issues was understood, the other parties agreed to an averaging option in exchange for other provisions.

A reg-neg also can produce a more reasonable result, even if no less stringent, than the results from the usual notice-and-comment process. This arises from the exchange of views among the parties. Participants are forced to deal directly with others' interests and points of view, respond to questions, and support others' views. This latter feature may be viewed as both an advantage and a disadvantage of the process. If your organization or client's position will not stand up well to skeptical probing by other participants, you may not achieve as much through a reg-neg as you might through a more traditional process.

☐ *Opportunity for Creative Solutions.* Another advantage of the reg-neg process is its brainstorming aspect. A variety of conceptual approaches to an issue can be explored before proposal, because participants may initially present different approaches and the ideas may build on themselves and evolve during the negotiations. This generally does not occur in the usual notice-and-comment process. Also, it is less likely to occur in a focus group setting. In focus groups, participants seem to talk to EPA representatives, not to each other.

The opportunity for creative solutions can be valuable to all participants. In some situations, EPA may feel that it does not have sufficient information or understanding of the relevant issues to formulate a regulatory initiative, or may believe that past approaches have not been successful. Thus, the Agency may wish to search for innovative ideas. Similarly, industry, environmental groups, or states may feel that new technical, policy, or legislative developments necessitate the replacement of old approaches.

These are some of the reasons EPA decided to initiate a reg-neg for equipment leaks. EPA believed that prior approaches—leak detection and repair alone—did not achieve optimal emissions reductions, nor did they provide industry with sufficient flexibility.[31] An example of a creative solution to a specific issue that emerged during the equipment leaks reg-neg was the concept of the quality improvement program. The negotiating committee wrestled with what would happen to a facility that had been unable to achieve the benchmark two-percent leaking valve level at the 500 parts per million (ppm) leak definition once that benchmark becomes applicable. One solution was to require that leak detection and repair (LDAR), which is the fundamental approach to reducing equipment leaks under this and other regulations, would have to be conducted every month.

Industry representatives believed that it would be virtually impossible to perform monthly LDAR and attempted to develop another solution based on actual plant experience. After discussing the issue from several perspectives, including what a plant technical expert would do if presented with this problem, it was decided to offer a facility in that situation a choice between doing monthly LDAR and embarking on a quality improvement program. A quality improvement program would consist of an analysis of the technical reasons for failure to achieve the benchmark levels and a program of maintenance or equipment upgrades designed to improve performance to the benchmark level.[32] This framework provided incentives for emission reduction and continuous improvement.

☐ *Increased Certainty of the Outcome.* A strong incentive for EPA to conduct a reg-neg is the hope that the process will produce a regulation that will proceed more quickly from proposal to promulgation, and that will not be tied up in litigation after it is promulgated. Other benefits to EPA are that the resulting rule will be more practical, while still meeting environmental goals and statutory requirements. Moreover, the rule will be less likely to require correction or amendment after it is promulgated. These also are advantages for industry, environmental, and state participants, because they assist in planning for future requirements and offer the opportunity to move to other issues.

There is a price to pay for the increased certainty that reg-neg parties expect to achieve, however. It is often difficult, from both industry and environmental viewpoints, to relinquish the right to submit adverse comments and legally challenge the final rule when the proposed and final rules are consistent with the agreement. But, since adverse parties also relinquish rights, this disadvantage has substantial offsetting benefits. Moreover, the outcome of a reg-neg is never completely certain, even if it culminates in an agreement that is honored by all participants. First, comments by persons other than the reg-neg participants can influence the shape of the final rule. Thus, the final rule may not be consistent with the negotiated agreement. To the extent that this is true, the parties to the reg-neg retain the right to bring legal challenges. Second, organizations that participated in the reg-neg will relinquish the right to comment and to litigate if the final rule is consistent with the agreement. However, as noted above, members of trade associations generally do not relinquish these rights, nor do others, such as environmental groups that did not actually participate in the reg-neg.

☐ *Resource Demands.* A major disadvantage of the reg-neg process is that it can be extremely resource-intensive and stressful. Creative solutions to complex problems do not come easily to a group composed of representatives of diverse viewpoints. For each moment of inspiration, there are countless moments of turmoil and tedium. This is reflected in the length of time it takes to complete a reg-neg. For example, the first negotiating session of the equipment leaks reg-neg was held in September 1989. Agreement on regulatory language was not announced until 18 months later, and agreement on the preamble language has yet to be achieved. In the interim, there were two-day meetings approximately every month, with subcommittee meetings to address critical issues. Aside from the meetings, a considerable amount of time was spent collecting data, building consensus positions, and drafting proposals and counterproposals for subsequent meetings.

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[30] Personal conversation with Deborah S. Dalton, EPA, July 21, 1992.

[31] *See supra* note 2 at 9316.

[32] *Id.* at 9317.

These resource demands can be particularly acute for environmental groups, companies, or associations without large staffs or adequate funds. Such entities must weigh carefully whether the issues involved are significant enough to warrant the expenditure of limited resources. Once one agrees to be a participant, it is difficult to bow out due to other priorities or because of a lack of resources.[33]

Evaluating the resource demands of reg-negs, however, is not complete without considering the resource demands of pursuing other options. While reg-negs require substantial up-front resources, preparing comments and, if necessary, engaging in litigation after a rule is promulgated may be equally resource-intensive, even though expenditures would occur over a longer period of time. And if your company or organization conducts a reg-neg with in-house personnel, rather than engaging outside counsel to prepare comments or to litigate under one of the other options, there might be overall cost savings in choosing a reg-neg. These potential savings may be eliminated, however, if a reg-neg is followed by significant adverse comments and substantial changes in the final rule. In such a case, the ultimate costs may include litigation expenses as well as the expenses consumed by the reg-neg.

There are ways to reduce the resource demands of a reg-neg in appropriate situations. One is for the reg-neg participants to limit the duration of the reg-neg and to adhere to that limit. Another way to reduce the resource demands is to restrict the issues to be negotiated. A third approach is to limit the degree to which consensus must be reached. If the number of issues is great and agreement on every word in the regulation and preamble is necessary, the upfront resource demands obviously will be great. There may be drawbacks to such limitations, however. The reg-neg may end earlier than expected, with greater efforts required afterward. If agreement is limited to principles—as was true in the fuels reg-neg—there may be a long road between reg-neg agreement and a final rule. As EPA has attempted to implement the fuels agreement, controversial issues have emerged that were not foreseen during the reg-neg. As a result, a final rule is not likely until the end of 1992, and the parties have remained actively at work on the issues.

☐ *The Balance of Power May Shift.* In a normal notice-and-comment rulemaking, industry participants generally outnumber environmentalists by a wide margin. Industry interests are also likely to be better funded. Although a regulatory agency does not let a head or page count determine the outcome of an issue, industry may feel that there is strength in numbers.

However, environmental groups may have greater power in the reg-neg process. It is especially difficult for consensus organizations, such as trade associations, to participate effectively in reg-negs. Often, elaborate and cumbersome processes and limitations on the authority of the formal representatives reduce maneuverability and flexibility. In contrast, although environmental participants may represent large constituencies and report on a reg-neg's progress to their own and other environmental groups, their representatives in reg-negs do not have the same obligation to consult frequently with constituents during the course of negotiations. Another advantage for environmental groups is that they have the opportunity to gain expertise in issues more quickly than they otherwise could by listening to EPA and industry participants, and by reviewing documents the other parties prepare for the negotiations. Finally, some environmental representatives have participated in a number of reg-negs, and thus, have developed considerable expertise in these negotiations. This gives them an advantage over most industry or state participants, who have not had the opportunity to develop this expertise.

Deborah Dalton of EPA's Office of Regulatory Management and Evaluation, who oversees EPA reg-negs, agrees that "some environmental groups may have greater influence in a reg-neg than they do in a normal rulemaking process, and EPA views reg-negs as a way of leveling the playing field."[34]

☐ *Potential Long-term Effects of Participation in a Reg-neg.* Participation in a reg-neg can affect long-term relationships with other parties. If the reg-neg results in agreement and is considered successful, it is likely that the respect participants gain for one another can produce benefits in future rulemakings or issues in which some of the same parties will have interests. Even an unsuccessful reg-neg can improve relationships between or among participants. Of course, if the reg-neg is not successful, or if negotiations have been acrimonious, the opposite can happen. Even relationships between participants whose interests are similar can suffer erosion. Further, if an organization is responsible for the collapse of the reg-neg by withdrawing in the midst of the process, there may well be adverse consequences in future endeavors. Similarly, an organization or client may decide to participate in a reg-neg partly because EPA or other parties have exerted pressure to participate, and the fear that refusal to do so may foster ill will with the agency, other parties, or the public.

☐ *The Need to Protect Your Interests.* In some situations, the reg-neg will not proceed without your organization or client's participation. In others, however, your organization or client's participation may not be considered essential, and the reg-neg will proceed without you. If the latter situation exists, it may be wise to participate, particularly if it is likely that an agreement reached among other parties will have an impact—even indirect—on your group. For example, the equipment leaks regulation[35] to be proposed pursuant to the recent equipment leaks reg-neg is directed principally at the synthetic chemical industry. However, the regulation was among the first regulations to be proposed pursuant to §112(d) of the amended Clean Air Act, and equipment leaks in the refining industry will be the subject of future §112(d) regulations. Thus, the American Petroleum Institute (API) expected that the synthetic chemical equipment leaks regulation would establish precedents for the subsequent regulation of refineries. Accordingly, API decided to participate in that negotiation to ensure that the views of its members would be considered before a regulatory precedent was established that might not be acceptable to refiners.

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[33] To ease the resource burden for some participants, it may be possible to obtain reimbursement for expenses pursuant to Negotiated Rulemaking Act §588(c), 5 U.S.C.A. §588(c) (West Supp. 1992).

[34] Telephone conversation between author and Deborah S. Dalton, July 21, 1992.

[35] *See supra* note 2.

### How to Conduct a Reg-neg Effectively

If your organization has decided to participate in a reg-neg, you can make the most of the experience with the proper approach. A few suggestions are presented below.

#### *Have Reasonable Expectations*

It is not reasonable to enter into a reg-neg expecting a one-sided outcome. Expect the other participants to be knowledgeable about the issues, to a greater or lesser extent, and to be skeptical of many of the positions you will advance, as you will be of theirs. In all probability, if the reg-neg is concluded successfully, the eventual rule will be more workable than it would have been otherwise. However, it probably will not be significantly more or less stringent than a regulation that EPA would have issued on its own.

For example, the equipment leaks regulation that EPA expects to propose is stringent because it seeks a benchmark level of control that will be tough for many chemical companies to achieve. It defines a "leak" at a low level (500 ppm for valves), and a low benchmark leak rate (two percent for valves). This level of stringency was satisfactory to EPA, the Natural Resources Defense Council, and the state participants. In fact, it may be more stringent than EPA expected at the outset of the negotiations. However, it is workable from industry's standpoint because these levels, by themselves, are not enforceable. Rather, if a facility does not achieve them, it may achieve compliance either by increasing the frequency of its monitoring or by developing and implementing a program designed to achieve these levels.

Similarly, in the fuels reg-neg, industry was able to obtain the right to use a simple model to certify appropriate fuel content for the first two years of the program. This model considers only three parameters and provides certainty, ease of implementation, and flexibility that might not otherwise have been obtained.[36]

Other aspects of workability that can be important to industry are recordkeeping and reporting requirements, and timetables for achieving compliance. It may be that EPA, states, and environmental representatives will be willing to compromise on these issues in order to obtain a regulation that they believe is relatively stringent. For example, with respect to timing, the two-percent leak rate at 500 ppm described above in the equipment leaks rule will apply only after a phase-in period, during which the control methods that many chemical plants now employ will be gradually tightened.[37]

Even if negotiations break down before an agreement is reached, the reg-neg can be a qualified success. You may have been able to persuade EPA—if not the states and environmentalists—that some of your ideas are worth pursuing. They may find their way into EPA's proposal after the breakdown of negotiations.

#### *Appoint an Effective Negotiating Team and Give It the Authority It Needs*

Your client or group generally will have one representative sitting at the negotiating table. Other members of the negotiating team may be present during negotiations as observers and may participate in caucuses. Effective participation during a reg-neg will involve the efforts of these persons, and possibly others who will develop and review proposals between negotiating sessions.

Negotiating skills, technical knowledge, and credibility are necessary for effective participation. Reg-negs are not technical symposia—they are negotiations. Thus, an attorney or other experienced negotiator can be effective. However, technical presentations are most often likely to be accepted by other parties if they are delivered by a technical expert with plant-level experience, rather than an attorney. The formal representative can be an attorney or other experienced negotiator with a technical adviser who sits close by, or in some cases a technical expert with an attorney nearby. Or you may decide that two persons should share the responsibility of being the official representative by taking turns, depending on what types of issues are under discussion, or simply by placing two people at the table. There are no fixed rules. An effective representative should be knowledgeable, articulate, assertive (but not overbearing), patient, and able to keep his or her organization or client's main objectives in mind in the midst of distractions and the multitude of issues that may arise during the reg-neg process.

To be an effective negotiator on behalf of a trade association or other organization representing a broad spectrum of viewpoints, it is essential that one possess considerable consensus-building skills. Even if one is successful inside the negotiating room, the value of what has been accomplished there may be lost if the negotiator is unable to convince the organization's members that the compromises made during the negotiating sessions were worthwhile. One person who assisted API on behalf of a member company in the equipment leaks negotiation observed:

> It is hard for member companies to understand the interplay of forces that occurs during the negotiations. Conveying a sense of this to the members is one of the most challenging aspects of the negotiator's role.[38]

Negotiators cannot be effective if they must constantly seek authorization from clients or constituents during the negotiations. Thus, it is well worthwhile to streamline internal approval processes to the greatest extent possible, and to give the negotiating representative the authority to make quick preliminary decisions. In a reg-neg, all parties understand that no real agreement can be reached until all participants obtain the approvals of their constituents. Proposals placed on the table are not binding and can be withdrawn any time prior to an agreement by the parties. If your clients or constituents understand this, it may be possible for representatives to be less constrained during the negotiations.

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[36] *See supra* note 3 at 13416-417.

[37] At each of the phases, the applicable requirements will be deemed to have satisfied the standards of Clean Air Act §112(d).

[38] Personal conversation between author and Richard C. Russell, formerly of Exxon Company USA, July 21, 1992.

*Speak With One Voice*

In a reg-neg, there is weakness in numbers. Although members of the public may be invited to express their views during the formal negotiating sessions, it can be detrimental to your group's interests to encourage individual group members to voice theirs. Unless someone has a particular piece of useful data or information to contribute, it is preferable to ask for caucus time to discuss issues than to have individual members of your group express their views during the public discussion.

Weakness in numbers also may be evident if there is insufficient coordination among participants whose overall interests are similar. Groups whose overall interests are similar should inform each other of proposals they are developing and key positions they wish to take before introducing proposals or taking positions during the negotiating sessions. It may not be possible to reach agreement on all issues, but communication and coordination among similarly situated participants can help avoid the possibility that parties with adverse interests will be able to take advantage of divisions between persons or groups whose interests are similar.

*Have Relevant Data and Analyses to Present*

You are at a serious disadvantage if you cannot bring relevant data and analyses to support your positions. If you develop data, it is essential to review it critically to ensure that it does, in fact, support your position before you present it. If you do not have data, however, all may not be lost. If you have a credible technical representative who can speak from personal experience with respect to a technical issue, you may be able to persuade the other participants that you have a valid point. This is an opportunity that generally does not exist in the normal notice-and-comment process.

*Identify Priority Issues and Issues You Can Trade*

If a reg-neg has any chance of success, it will involve enough issues so that participants from different perspectives can obtain concessions from others on some issues in exchange for making concessions on other issues. It is of obvious importance to identify your key issues and to bear them in mind as negotiations proceed. It also is useful to review them periodically. But the likelihood of achieving your key objectives will depend, in part, on your ability to identify issues of lesser importance to your group that can be the basis for concessions to other parties. As is evident from examples from the equipment leaks and fuels reg-negs described earlier, industry may be willing to accept additional control requirements in exchange for benefits in flexibility, simplicity, or compliance time.

**Conclusion**

The reg-neg process has come of age. It is trendy and appears to be here to stay. Reg-negs can achieve reasonable, workable regulations, if participants can withstand the stress and resource demands of a contentious, tedious, and time-consuming process. It is best reserved for situations in which either: (1) your client or organization believes other options are not likely to yield the desired results; or (2) increased certainty of the outcome is especially important. If you become a reg-neg participant, be prepared for a roller-coaster experience. And you probably will not wish to participate in several reg-negs in rapid succession.

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1 What is Negotiated Rulemaking?
2 When to Use Negotiated Rulemaking
3 Statutory Basis for Negotiated Rulemaking
4 The Convening Process
5 Orientation and Training of Participants
6 Negotiating the Rule
7 Concluding the Negotiations
8 Resources and Logistics
9 Negotiated Rulemaking at the State Level
10 Table of Agency Experience
11 Sources of Assistance
12 Bibliography
13 Selected Articles